TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 354

CAROLINE R. KUEHNER AND FREDERICK G. FISCHER, AS TRUSTEES, PETITIONERS,

vs.

GRAYSON M-P. MURPHY, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1936.

CERTIORARI GRANTED OCTOBER 26, 1936.

SUPREME COURT OF THE UNITED STATES

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vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

CAROLINE R. KUEHNER and FREDERICK G. FISCHER,
as trustees,
Appellants,

2

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Appellees.

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Cross-Appellants,

CAROLINE R. KUEHNER and FREDERICK G. FISCHER,
as trustees, et al.,
Cross-Appellees.

(Cross Appeals.)

3

Statement Pursuant to Rule No. XIII.

This proceeding was commenced in the United States District Court for the Southern District of New York on or about October 5, 1934, by the filing of a proof of claim, sworn to October 5, 1934, by the claimants, Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, deceased. United Cigar Stores Company of America, the above-named Debtor, a

former tenant of the predecessors in interest of the claimants, filed its petition for reorganization under Section 77B of the Bankruptcy Act on or about June 9, 1934.

The original parties to the proceeding instituted by the above-mentioned claimants were said claimants, Irving Trust Company, as trustee of the estate of the Debtor, and certain intervenors,—to wit, Grayson M-P. Murphy, et al., as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, et al., as a Debentureholders' Protective Committee, United Stores Corporation, Jacob Ruppert Realty Corporation, and Peter Grimm, et al., as a Landlords' Protective Committee. United Stores Corporation subsequently withdrew as an intervenor and by its petition verified November 22, 1935, Phoenix Securities Corporation prayed leave to intervene, which leave was subsequently granted. The Debtor never appeared at the hearings before the Special Master on the trustee's objections to the claim set forth in the aforesaid proof of claim nor at the hearing in said District Court upon the exceptions filed by the claimants, the above-mentioned Preferred Stockholders' Protective Committee, and the above-mentioned Debentureholders' Protective Committee to the report of the Special Master; and counsel for the Debtor have notified counsel for the claimants that it is not necessary to secure their consent to nor serve upon them copies of this transcript of record.

Irving Trust Company, as trustee of the estate of the Debtor, served upon counsel for the claimants on or about May 22, 1935, a copy of its petition praying that a time be fixed by the Hon. Irwin Kurtz, Special Master to whom said District Court had by its order dated July 17, 1934, re-

ferred all claims for consideration and report, for hearing its objections to said claim and also a notice notifying the claimants that such hearing would be held on June 4, 1935. 7

The hearing before the Special Master on the trustee's objections was held before Hon. Irwin Kurtz, Special Master as aforesaid, on May 22, 1935, and was adjourned to June 24, 1935.

The report of the Special Master dated October 23, 1935, recommended that the claim be allowed in part and that the question of the validity and rank of the remaining portion of the claim should be reserved for future determination.

On or about February 5, 1936, an order was entered by the District Court confirming in part and overruling in part said report of the Special Master, and both the above-mentioned claimants and the above-mentioned Preferred Stockholders' Protective Committee and the above-mentioned Debentureholders' Protective Committee have taken appeals from said order. The orders of said District Court allowing said appeals were dated March 4, 1936. 8

No parties have been arrested or bail taken or property attached or arrested, and the Debtor's estate is in the possession of Irving Trust Company, as trustee as aforesaid. 9

Proof of Claim.

10 UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

11 ---

United States of America,
District of —ss.:

At the City of Trenton, County of Mercer, State of New Jersey, on the date hereinafter set forth, came CAROLINE R. KUEHNER and FREDERICK G. FISCHER and made oath and say that:

I.

We, Caroline R. Kuehner and Frederick G. Fischer, individually and as trustees of the Es-
12 tate of Adam Fischer, deceased, acting under our authority as trustees, and duly authorized to make this proof as such, and as representing the ultimate beneficiaries under the last will of Adam Fischer, deceased, who joined in the execution of the lease hereinafter referred to because of our interest in said premises as remaindermen or otherwise, and in behalf of the heirs and next of kin of Edward A. Fischer, deceased, and late trustee of the estate of Adam Fischer, deceased, the said Frederick G. Fischer having been duly appointed and qualified as co-trustee under said

last will of Adam Fischer, deceased, in the place 13
and stead of the said Edward A. Fischer, now deceased. We, the said trustees, being still in control of the property described in said lease and entitled to collect the rents and profits of the same, and in full charge of the management and control of said property.

II.

United Cigar Stores Company of America, the corporation which is the debtor in the above-entitled proceeding for reorganization (hereinafter called the Debtor), on August 29, 1932, 14
filed its voluntary petition in bankruptcy and was adjudicated a bankrupt in a proceeding in the above-mentioned Court (Docket No. 55129), and Irving Trust Company was appointed trustee in bankruptcy of said bankrupt and acted as such trustee in bankruptcy (herein called the Trustee in Bankruptcy) until June 14, 1934, the date of approval of the petition herein.

The claimant is the present owner of a claim against the Debtor, based upon or arising out of the lease dated October 18th, 1926 between Edward A. Fischer and Caroline R. Kuehner indi- 15
vidually and as executors and trustees of the Estate of Adam Fischer, dec'd, and Frederick G. Fischer, Margaret G. Fischer, Margarette Hensler, Louis Fischer, Jr. and Ruth Fischer, as Landlord, and the Debtor, as Tenant, covering the premises described therein, for a term commencing prior to August 29, 1932, and ending on March 31st, 1946, or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy on or about November 14th, 1932, or for damages or indemnity under a covenant or covenants contained in said lease.

16 The Trustee in Bankruptcy surrendered the premises covered by said lease on November 14th, 1932.

[Insert date on which possession of premises was turned over, or, if that date is not known, insert date of notice from Trustee in Bankruptcy that lease was rejected.] The landlord reentered said premises on November 15th, 1932.

Except to the extent hereinafter shown, neither the Debtor nor the Trustee in Bankruptcy has paid the rent or other obligations accruing under said lease after the 1st day of September, 1932.

[If the claimant is not the landlord named in the above-described lease, give explanation of how ownership of the claim was acquired, *i. e.*, by purchase of the premises, assign-
17 ment, inheritance, or otherwise:]

III.

The Debtor was on and before June 14, 1934, the date of the approval of the petition herein, and still is, justly and truly indebted to the claimant for amounts payable under said lease or for injury resulting from the rejection of said lease by the Trustee in Bankruptcy or for damages or indemnity under a covenant or covenants contained in said lease, computed as follows:

18	Total net or fixed rent for entire term which has not been paid by the Debtor	$151,083.33	
	Total taxes, insurance, assessments, water rents or rates and other payments required to be made by Debtor for entire term which have not been paid by the Debtor (use actual amounts so far as known and estimates for the future—see footnote 1)	1,326.80	(last 4 mos. 1932) taxes
		2,917.09	(year 1933) "
		3,142.80	(" 1934) "
		33,750.00	(estimated at $3,000. per year for 11 years and 3 mos.)
	Total lease obligations which have not been paid by the Debtor		$192,220.02

Less:

Fair rental value of leased premises from date of rejection of lease to end of term (see footnote 2)	$100,250.00	
Dividends paid in bankruptcy proceedings on any claim based on original lease	1,110.34	
Amount paid by Trustee in Bankruptcy for use and occupation of premises by such trustee	646.77	
Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of rejection of lease	0.00	
		$102,007.11
Total amount claimed for entire term of original lease		$ 90,212.91

Claim is hereby made against the Debtor in the amount above set forth, together with such interest thereon as may be allowed by law.

1. Explain how future taxes, etc., are estimated: Taxes are estimated at $3,000. a year, based on average of last 3 years which are about $1,000. less per year than the previous 3 year period.

2. If all or any part of the leased premises was relet to another tenant for all or any part of the balance of the term of the original lease, the terms of the new lease should be taken into consideration in making this estimate; a copy of the new lease should be attached to this proof of claim, marked Exhibit A, and the following information should be supplied:

Name of new tenant: SaLee Shoppe, Inc., and Barney Oiitzsky.
Date of commencement of term of new lease: 4.1.1933 —10.21.1933.
Date of expiration of term of new lease:
Net or fixed rent per year under new lease: $
Taxes and other payments per year under new lease: $ (See copies of leases hereto annexed.)

Explain how future taxes, etc., are estimated:

State also any other facts on which estimate of fair rental value is based, stating such facts, if necessary, on a separate page as a schedule hereto:

22 Present tenants not holding leases are as follows: Charles C. Wacks, 3d floor front, $20.00 per month from July 15th, 1934, monthly tenant; Piat (first name unknown) one living apartment on fourth floor, $25.00 per month, from May 1st, 1934; E. A. Devlin, fourth floor rear, $22.50 per month from January 1st, 1933. All these are monthly tenants, holding from month to month.

Fair rental values are estimated to be a gross of $500.00 a month collectible rent, and this is allowed from date of surrender of premises November 14th, 1932, although as per leases, copies of which are attached, there was a period of several months of vacancies before tenants could be had. The present gross rent is $507.00 per month, from which only $7.00 a month is deducted for losses and vacancies. Experience since surrender of the lease indicates that approximately $500.00 per month is the largest rent return which can be expected from the property. The tenant for the LaSalle Shoppe, Inc., ground floor, has applied for a reduction of rent and it is by no means certain that this first floor can be continued to rent under as favorable terms as the present
23 lease, even during the time of its lease. Nothing has been received from lease above the fixed minimum rent. New leases require claimant to heat entire building and pay water rent and insurance, and taxes.

IV.

This claim in the amount above set forth, together with interest thereon as aforesaid, is allowable on a parity with debts which would be provable under Section 63 (a) of the Bankruptcy Act to the extent of the amount provided in subdivision (b) of Section 77B of the Bankruptcy Act, which said amount is computed as follows:

24 Net or fixed rent accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	$2,187.50
Taxes, assessments, insurance, water rents or rates and other payments accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor	829.25

Total lease obligations accrued up to date of surrender of premises or date of reentry by landlord, whichever first occurred, and not paid by the Debtor		$3,016.75	25
Less:			
Dividends paid in the bankruptcy proceeding on any claim based on original lease	$1,110.34		
Amount paid by Trustee in Bankruptcy for use and occupation of premises by said trustee	646.77		
Amounts paid by subtenants of Debtor to landlord under original lease for occupancy up to date of surrender of premises or date of reentry by landlord, whichever first occurred	0.00		26
Unpaid lease obligations accrued up to date of surrender or reentry, whichever first occurred		$2,187.50	
Net or fixed rent reserved in lease (without acceleration) for three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	$31,500.00		27
Taxes, assessments, insurance, water rents or rates and other payments to be made by Debtor during three years next succeeding date of surrender of premises or date of reentry by landlord, whichever first occurred, or for entire balance of term if less than three years	9,386.69		

28	Total lease obligations for three year period above described, or for entire balance of term if less than three years	40,886.69
	Total amount of claim allowable under Section 77B on a parity with debts which would be provable under Section 63 (a)	$43,074.19

Claim is hereby made against the Debtor in the amount above set forth, together with such interest thereon as may be allowed by law, on a parity with debts which would be provable under
29 said Section 63 (a).

V.

To the extent that the total amount of the claim for the entire term of the original lease, as hereinabove set forth in subdivision III hereof, is not allowable on a parity with debts which would be provable under said Section 63 (a), said claim should be allowed in subordination to debts so provable, but in priority to the claims or interests of holders of preferred and common stock of the Debtor.

30

VI.

No part of the claim herein asserted has been paid, and there are no setoffs or counterclaims thereto except as follows: $646.77 Moneys received for use and occupation from trustee in bankruptcy, between date of adjudication and date of surrender of lease. The claimant has not nor has any person for or on behalf of the claimant, to deponent's knowledge or belief, had or received, for the use or benefit of the claimant, any security

for said debt, except as follows: None. No judgment has been rendered therefor, nor for any part thereof, but a claim based on said lease was filed in said bankruptcy proceeding and was allowed in the amount of $893.89 and $663.40—Claim No. 2099—Lease No. 439. 31

In executing and filing this proof of claim, the claimant in no way waives any rights which the claimant may have to reclaim specific assets and expressly reserves such rights.

FREDERICK G. FISCHER L. S.
CAROLINE R. KUEHNER L. S.
Individually and as trustees under the last will of Adam Fischer, deceased, and as agents for the ultimate beneficiaries under said will. 32

Address to which all notices should be mailed:
Harvey T. Satterthwaite, Att'y,
137 E. State Street,
Trenton, N. J.

Subscribed and sworn to before me
this 5th day of October, 1934. 33

SARA A. SATTERTHWAITE,
Notary Public.

Notice of Hearing on Trustee's Objections to Claim.

34 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation—No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

PLEASE TAKE NOTICE that upon the annexed petition of Irving Trust Company, Trustee of the estate of the above-named Debtor, verified May 17, 1935, a hearing will be held before Hon. Irwin Kurtz, Special Master, at 15 Park Row, Borough of Manhattan, City of New York, N. Y., on June 4th, 1935, at 3:00 o'clock in the afternoon, or as soon thereafter as counsel may be heard, and that at said hearing the undersigned will move this Court to have the claim referred to in said petition reduced to an amount found by the Court to be properly allowable in these proceedings.

35

Dated, New York, N. Y., May 21, 1935.

36

Yours, etc.,

CRAVATH, DE GERSDORFF,
SWAINE & WOOD,
Attorneys and Solicitors for
Irving Trust Company,
Trustee of the estate of
United Cigar Stores Company of America, Debtor,
Office and Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

Notice of Hearing on Trustee's Objections to Claim.

37

To:

HARVEY T. SATTERTHWAITE,
137 E. State Street,
Trenton, N. J.

ROSENBERG, GOLDMARK & COLIN,
165 Broadway,
New York, N. Y.,
Attorneys for Debtor.

M. CARL LEVINE,
535 Fifth Avenue,
New York, N. Y., 38
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.

and

RALPH MONTGOMERY ARKUSH,
15 Broad Street,
New York, N. Y.
Attorneys for Landlords' Protective Committee. 39

SHEARMAN & STERLING,
55 Wall Street,
New York, N. Y.

and

BERLE & BERLE,
70 Pine Street,
New York, N. Y.
Attorneys for Preferred Stockholders' Protective Committee.

Petition of Trustee for Hearing its Objections to Claim.

40

DAVIS, POLK, WARDWELL, GARDINER & REED,
15 Broad Street,
New York, N. Y.
Attorneys for Debentureholders Protective Committee.

SULLIVAN & CROMWELL,
48 Wall Street,
New York, N. Y.
Attorneys for United Stores Corporation.

41

Petition of Trustee for Hearing Its Objections to Claim.

DISTRICT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation—No. 59,886.

In the Matter

of

42

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

To the Honorable Irwin Kurtz, Special Master:

The petition of Irving Trust Company, as Trustee of the estate of the above-named Debtor, respectfully shows to the Court as follows:

On June 14, 1934, your petitioner was duly appointed temporarily and qualified as Trustee of

Petition of Trustee for Hearing its Objections to Claim.

the estate of the above-named Debtor, and on July 17, 1934, the appointment of your petitioner as Trustee was made permanent.

There has been filed with this Court a proof of claim numbered 5184 by Caroline R. Kuehner and Frederick G. Fischer, individually and as Trustees of the Estate of Adam Fischer, deceased, and as agents for the ultimate beneficiaries under said will (hereinafter called the Claimant) setting forth an alleged claim of the Claimant against the Debtor in the sum of $90,212.91 w/int. Your petitioner objects to the allowance in full of said claim for the following reasons:

The Trustee objects to the allowance of this claim as filed and asks that it be reduced to an amount limited as provided by statute. The trustee is advised that to the extent that the total amount of the injury alleged to have been sustained by the claimants resulting from the rejection of the lease upon which the claim is based by the Trustee in Bankruptcy exceeds an amount so limited, said claim is not, as set forth in the proof of claim, entitled to be allowed in these proceedings in subordination to debts which would be provable under Section 63 (a) of the Bankruptcy Act, but in priority to interests of holders of preferred and common stock of the Debtor.

Your petitioner, accordingly, desires to have its objections to said claim heard and considered, and said claim reduced to an amount found by this Court to be properly allowable in these proceedings.

This petition and all proceedings had thereon are not intended to affect in any way, or to waive any rights of your petitioner in regard to, the questions reserved by the Court for further deter-

46 mination as provided in its order of July 17, 1934 as amended, and, except as specifically stated in the foregoing objections, your petitioner reserves its right of objection, as provided by order of this Court dated November 13, 1934, with respect to all questions relating to the scrutiny of the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages to be allowed the assignee thereof, and the limitation of claims filed by committee members or agents to the actual consideration paid
47 therefor.

WHEREFORE, your petitioner respectfully requests that a time be fixed by this Court for hearing your petitioner's objections to said claim of which due notice to the Claimant and to all persons and parties who have intervened in these proceedings, or to their attorneys, shall be given by mail.

Dated, May 17, 1935.

48 IRVING TRUST COMPANY,
as Trustee of the estate of United Cigar Stores Company of America, Debtor,
By JOSEPH T. STEARNS,
Assistant Secretary.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys and Solicitors for said Trustee,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

Petition of Trustee for Hearing its Objections to Claim.

49

United States of America,
Southern District of New York,
State of New York,
County of New York—ss.:

JOSEPH T. STEARNS, being duly sworn, deposes and says that he is an Assistant Secretary of Irving Trust Company, the petitioner herein, and that he has read the foregoing petition and knows the contents thereof, and is informed and verily believes that the same is true.

JOSEPH T. STEARNS. 50

Subscribed and sworn to before me
this 17th day of May, 1935.

ANNE L. RANDBY,
Notary Public,
Kings County.
Kings Co. Clk's No. 376, Reg. No. 7051.
N. Y. Co. Clk's No. 25, Reg. No. 7 R 64.
Cer. filed N. Y. Co.
Commission expires March 30, 1937.

51

Minutes of Hearing on Objection to Claim.

52

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

(In Bankruptcy.)

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

53

New York, June 24, 1935.

2:30 o'clock, P. M.

Before—IRWIN KURTZ, ESQ., *Special Master*.

HEARING ON OBJECTION TO CLAIM OF CAROLINE R. KUEHNER AND FREDERICK G. FISCHER AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ADAM FISCHER, DECEASED, CLAIM DESIGNATED AS

54 No. 5184.

PROCEEDED PURSUANT TO ADJOURNMENT.

APPEARANCES:

MESSRS. CRAVATH, DEGERSDORFF, SWAINE & WOOD, Attorneys for the Trustee, by Donald C. Swatland and B. R. Shute, Esqrs., of Counsel.

MESSRS. MITCHELL, TAYLOR, CAPRON & MARSH, Attorneys for the Claimant, by Henry L. Glenn, Esq., of Counsel.

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED, Attorneys for Debentureholders Committee, Intervenor, by Edgar G. Crossman, Esq., of Counsel. 55

MESSRS. SHEARMAN & STERLING, Attorneys for Preferred Stockholders' Protective Committee, Intervenor, by Douglas Steimle, Esq., of Counsel, and

MESSRS. BERLE & BERLE, Associate Counsel, by Winthrop H. Kellogg, Esq., of Counsel.

MESSRS. SULLIVAN & CROMWELL, Attorneys for United Stores Realty Corporation, Intervenor, by Alexander M. Grean, Jr. Esq., of Counsel. 56

M. CARL LEVINE, ESQ., Attorney for Jacob Ruppert Realty Corporation and other Creditors, Intervenors, by David Morgulas, Esq., of Counsel.

MESSRS. SMYTH & TUTTLE, Attorneys for Trustees of Cigar Stores Realty Holdings, Inc., Intervenor, by Bruce R. Tuttle, Esq., of Counsel.

The Master: This is claim No. 5184 of Caroline R. Kuehner and Frederick G. Fischer, individually and as trustees under the will of Adam Fischer, deceased. The claim is filed in the sum of $90,212.91. 57

(Discussion off the record.)

Mr. Shute: The trustee objected to the allowance of this claim as it was filed and asked that it be reduced to the amount limited by statute, to-wit, the three-year limitation.

The real estate department of the trustee had investigated the claim as filed and found that the fair rental value which was allowed in the claim was a reasonable one and one that we approve. The only remaining question then was

58 the one reducing it to the statutory maximum, and although that amount is not set forth in the motion papers it was—the statutory maximum was—$41,699.38.

The Master: Now off the record.

(Further discussion off the record.)

Mr. Kellogg: Is there any dispute about the three-year maximum here, Mr. Glenn, that the claim is allowable for the amount that has been suggested by Mr. Shute?

Mr. Glenn: There was not at the time we were trying to get the three-year rent claim allowed, but now that we have to prove the actual
59 amount of damages the way we compute it now is about $43,000 or $44,000.

Mr. Grean: May I ask does that three-year amount include taxes?

Mr. Glenn: Yes.

This claim, your Honor, as I understand it, is a test case which has been chosen to test out two legal questions principally, one the validity of the excess of the landlord's claim over the statutory parity claim, as I describe it—not the statutory maximum claim, and the other the question of the present provability of the dam-
60 ages sustained by this landlord.

The lease is a long term lease and the lease contains the usual covenant of indemnity whereby in the event of the termination of the lease by the landlord as the result of the default of the tenant the tenant covenants to indemnify the landlord against any loss of rent incurred throughout the remainder of the term.

The counsel for the preferred stockholders' committee and the debentureholders' committee take the position, as I understand, that such claim is not presently provable because under the doctrine

of Hermitage against Levine there is no sure way of determining the loss of rent to be suffered by this landlord until the expiration of the term. Counsel have shown an unusual amount of co-operation in signing two stipulations of fact which we believe contain all the material facts for the settlement of these two questions. 61

The Master: Mark them in evidence.

Mr. Glenn: I offer them in evidence.

Mr. Kellogg: Your Honor, we have objection as to the relevancy and materiality of parts of these stipulations.

May I have, Mr. Grean, my copy of the stipulation? (Document is handed to Mr. Kellogg by Mr. Grean.) 62

Mr. Kellogg: The stipulation provides—the main stipulation provides at the end thereof, that this stipulation is made without prejudice to the right of any of the undersigned to object to the admission of this stipulation in whole or in part on the ground that it or any part thereof is irrelevant or immaterial, but all other possible grounds of objection to its admissibility or to the admissibility of any of the facts are hereby waived.

I would like to state first the parts of the principal stipulation. 63

The Master: Mark it for identification.

Mark first the original stipulation, then the—(interrupted by)

Mr. Kellogg: Off the record, your Honor.

The Master: Mark the one that Mr. Kellogg is now objecting to, the main stipulation so-called.

(Document referred to is marked, "Trustee's Exhibit 1 for Identification", of this date.)

The Master: Off the record.

64 (Further discussion off the record.)

Mr. Kellogg: We object to the parts of this stipulation which is marked as Trustee's Exhibit 1 for Identification, which are as follows:

The Master: May I see it, Mr. Glenn? (Document is handed to the Master.)

Mr. Kellogg (continuing): Beginning at the top of page 3 of this stipulation and ending at the bottom of page 3; that is, our stipulation goes to all of the matter which is set forth on page 3 of the stipulation.

We also object—(interrupted by)

The Master: Objection overruled.

65 Mr. Kellogg: I have not stated, your Honor, the full grounds for my objection.

The Master: I thought you had.

Mr. Kellogg: There were other parts which I am going to refer to.

The Master: All right.

Mr. Kellogg: We also object to the part of this stipulation which begins in the middle of page 5 with the paragraph which starts, "The amount received", beginning at that point and following over to the middle of page 6, the paragraph ending, "during the period of his tenancy".

66 Mr. Crossman: The second paragraph.

Mr. Kellogg: Pardon me.

The Master: Which paragraph; including the third paragraph or the second?

Mr. Kellogg: Including the third paragraph, your Honor, in the middle of the page.

The provision of this lease with regard to defaults is found in article "Tenth" thereof and it is to the effect that if the tenant defaults in the lease, if the lease should be taken on execution or if the tenant should be adjudicated a bankrupt, or if any assignment of this property should be

made for the benefit of creditors then in any of 67
such cases the landlord may lawfully enter into and upon the said premises or any part thereof in the name of the whole and repossess the same and expel the tenant and those claiming under it without being deemed guilty of any manner of trespass and without prejudice to any rights which might otherwise be used for arrears of rent or preceding breach of covenant and upon entry as aforesaid this lease shall determine and the tenant covenants that in case of such termination it will indemnify the landlord against all loss of rent which the landlord may incur by reason of 68
such termination during the residue of the term above specified.

That default provision is in approximately the same language as that which was used in the case of the lease which was used in the action in the United States Supreme Court in the case of *Brown* against *U. S. Trust Company* which was reported in 201 U. S.

Similar forms of the indemnity agreement have also been before the highest Court in this State and other states, and those doctrines agree with the decision of the United States Supreme Court which is to the effect that there is no way of telling 69
until the end of the period of the lease whether or not there will be any loss; that there is no claim, that there is no indebtedness which arises until that period expires.

It is our position—(interrupted by).

The Master: Just a minute. I understood you were making an objection to the introduction. I do not want to argue the law on that because I do not want to pass upon that. I am going to overrule you without passing upon the question of law at all.

70 Mr. Kellogg: I was simply trying to make it clear to your Honor.

The Master: Yes. I know the point you are raising.

Mr. Kellogg: I beg your pardon for elaboration.

The Master: Objection overruled. Exception.

Mr. Glenn: I also offer in evidence, your Honor—(interrupted by).

The Master: Wait a minute. Now you are offering this in evidence?

Mr. Glenn: I offer in evidence Trustee's Exhibit 1 for Identification.

71 (Trustee's Exhibit 1 for Identification is received in evidence and marked, Claimant's Exhibit A, of this date.)

The Master: Let it appear on the record that Mr. Crossman joins in the exception taken by Mr. Kellogg and it is understood that hereafter when any objection is made it is to redound to the benefit of all of the intervenors and that whenever there is any exception every intervenor is to have the benefit of the exception.

Mr. Glenn: I also offer in evidence a second stipulation of facts signed by all interested coun-

72 sel.

The Master: You are going to make objection to that?

Mr. Kellogg: The paper which has just been offered in evidence contains a single provision reserving the right to object to the contents of the paper on the ground that it is immaterial or irrelevant. We object to this entire stipulation on those grounds and those previously stated.

The Master: Objection overruled. Exception to all intervenors. Mark it.

(Document referred to is received in evidence and marked, Claimant's Exhibit B, of this date.) 73

Mr. Glenn: Now I request that the proof of claim filed by these claimants in the old bankruptcy proceeding and your Honor's order allowing the proof of claim in part be deemed to be a part of the records in this proceeding.

(Colloquy off the record.)

The Master: All right, I will so consider them.

Mr. Glenn: In view of the position taken by Mr. Kellogg, I now request your Honor to permit an amendment to the proof of claim filed in these proceedings by the claimants. The amendment 74 reads as follows:

"The claimants pray that if the court should determine that their statutory parity claim for three years' rent, etcetera, for injury resulting from the rejection of said lease by the trustee in bankruptcy, or for damages or indemnity under the covenant or covenants contained in said lease, is not presently provable in the above-entitled reorganization proceedings, then and in such event the court should in the order determining that said statutory parity claim is not presently provable provide that said statutory parity claim of 75 the claimants should constitute a legal or equitable charge upon the assets of the debtor payable by the debtor and/or any corporation to which the assets of the debtor may be transferred at such times as the damages suffered by the claimants from said rejection or the breach of said covenants shall become liquidated in accordance with the applicable State law.

"Claimants further pray that if the court should determine that the total amount of damages suffered by the claimants for the entire term of said lease from said rejection or the breach of said

covenants over the amount of said statutory parity claim is not presently provable in the above-entitled reorganization proceedings, then and in such event, whether or not said statutory parity claim shall be held provable at this time, the court should provide in the order so determining that said excess claim should constitute a legal or equitable charge upon the assets of the debtor in subordination to debts which would be provable under Section 63 (a) of the Bankruptcy Act and to any statutory parity claims which may also constitute a charge against said assets, but in priority to the claims or interest of all holders of preferred and common stock of the debtor."

Mr. Kellogg: If your Honor please, we did not know that the claimant was going to ask for an amendment of the proof of claim but it seems to me this is a question of how your Honor might dispose of this thing. The law contains certain provisions as to how certain rights should be reserved, subdivision "h" of Section 77-B. It does not seem to me that it is relevant as an amendment of the claim as it is presented here.

The Master: I do not think it is.

You could raise the issue in your memorandum that you will submit, but I do not think that is a proper amendment of the claim.

Mr. Glenn: Your Honor, the proof of claim is in a sense a pleading in this sort of proceeding. It merely contains one prayer: First, that the court should allow the claim or should, in other words, determine if it is presently provable. It seems appropriate under the circumstances if your Honor should determine that no part of this claim or the excess claim is now presently provable that the status of that claim so far as it can constitute a liability against the debtor should now be determined.

As a matter of fact I should think it would be 79
in the interest of Mr. Kellogg to know at the earliest possible moment what the status of the excess claim is, because until it is determined no plan of reorganization can be negotiated.

Mr. Crossman: I think we do want to know that, whether there is any so-called excess claim.

The Master: If that be so, don't you think it would be wise for you to withdraw your objection to the amendment at this time and have that matter passed on?

Mr. Kellogg: Your Honor, I would prefer that this should be before the Court. I am reading 80
that. I do not see any harm.

Mr. Morgulas: I think that would be a proper amendment.

Mr. Kellogg: As a part of the prayer for relief I will consent to the amendment in that regard.

The Master: All right, mark it.

Mr. Swatland: That means, I take it, consenting to the request for the amendment, not the relief prayed for.

Mr. Crossman: Objecting to the relief prayed for.

The Master: Mark it. 81

(Paper referred to is received in evidence and marked Claimant's Exhibit C of this date.)

The Master: Off the record.

(Further discussion off the record.)

Mr. Glenn: That is the claimant's case, your Honor.

Mr. Kellogg: Pardon me, Mr. Glenn, are you not going to offer in evidence the map which you referred to in the affidavit there?

82 Mr. Glenn: No, I did not think it was necessary, Mr. Kellogg, since the stipulation concedes —(interrupted by).

Mr. Kellogg: Have you that map here?

Mr. Glenn: No, I did not bring it here.

Mr. Kellogg: I thought that would be part of the record here.

Mr. Glenn: It simply goes to establish that the real estate expert there is a real estate expert.

(Further colloquy off the record.)

Mr. Kellogg: Judge Wise.

83 Mr. Crossman: Before you call a witness I want to state that in connection with this claim I reserve my right to object to the constitutionality of that part of 77-B which puts this claim on a parity with claims which originally were provable in bankruptcy.

Mr. Glenn: I would suggest that your Honor deny that request and I think that perhaps Mr. Crossman on second thought may consent to its withdrawal, because it seems to me that question is bound up to some extent with the question which is presented in this claim because we shall argue that if your Honor finds that the claim is
84 not presently provable that the statute is unconstitutional and that the provision according a claim a statutory parity for three years' rent and so forth is unconstitutional, which is really the objective aimed at by Mr. Crossman.

Mr. Crossman: I think the objective, if I may say so—(interrupted by).

The Master: I am going to let him reserve any of his rights.

Mr. Morgulas: I think we have that in the record already.

The Master: Yes.

Mr. Crossman: Off the record. 85

(Further discussion off the record.)

The Master: You have rested as I understand?

Mr. Glenn: Yes, I have rested.

The Master: All right, I will hear the other side.

GEORGE J. WISE, a witness called in behalf of the trustee and intervenors, having been first duly sworn by the Master, testified as follows:

Direct examination by Mr. Kellogg:

86

Q. Judge Wise, you have been since August 29, 1932, an employee of the Irving Trust Company? A. Yes, sir.

Q. First as trustee in bankruptcy and then as trustee in the present proceeding? A. Yes.

Q. In that capacity you have been serving in the real estate department of the trustee? A. Yes.

Q. Prior to that time you had been for a great many years the head of the real estate department of the United Cigar Stores Company of America? A. Yes.

87

Q. The debtor in this proceeding? A. Yes.

Q. You have studied properties in various cities with a view to renting those properties? A. Yes.

Q. On behalf of the United Cigar Stores Company or its trustee? A. Yes.

Q. Are you acquainted with the property which is located at—which is known as the Adam-Fischer Estate property and which is located—which is known as No. 45 East State Street, Trenton, New Jersey? A. Yes.

Q. Will you please state on what—will you

88 please state what the size of Trenton, New Jersey, is? A. I think about 115,000 or 120,000 population.

Q. Does that city have its shopping properties draw upon contiguous territory? A. Yes, very largely.

Q. Where is the center of the City of Trenton? A. State and Broad Streets.

Q. Where is this property with regard to the corner of State and Broad Streets? A. Adjoining one of the corners. I will get the direction in a moment from this map.

89

The Master: When you state the center, Mr. Wise, you mean the shopping center rather than the actual center of the town?

The Witness: I meant the shopping center, the business center.

Q. You were getting the directions. A. Yes. That would be the northwest corner.

Q. This is a location which was formerly occupied by the United Cigar Stores Company or its subsidiary company? A. Yes.

Q. It adjoins the corner property? A. Yes.

90 Q. Which was also occupied by the United Cigar Stores Company or its subsidiary company? A. Yes.

Q. And that adjacent property is known as the Bugbee property? A. Correct.

Q. In determining chain store locations, the best locations as I understand it you refer to as one hundred percent locations? A. Yes.

Q. How would you describe this location here in the parlance of the chain store real estate management? A. Taking the four corners I would say they would represent the business center

of the city and constitute the one hundred percent locations of property for business purposes. 91

Q. Where is the capital of the State of New Jersey located with reference to the property, in which direction? A. To the west.

Q. That is desirable property for the renting to a chain store project like a chain shoe store? A. I would say it is desirable for any retail business.

Q. Is that location going downhill at all at the present time to your knowledge? A. No. I consider it still the center of Trenton.

Q. So far as you can judge in the future it would continue to be one of the best locations in the City of Trenton? A. Yes. 92

Mr. Kellogg: That is all.
The Master: Mr. Glenn?
Mr. Glenn: No questions.
(Thereupon, the witness was excused.)
Mr. Kellogg: Mr. Sientz.

MICHAEL I. SIENTZ, a witness called in behalf of the trustee and intervenors, having been first duly sworn by the Master, testified as follows: 93

The Master: Your full name?
Mr. Sientz: Michael I. Sientz.

Direct examination by Mr. Kellogg:

Q. What is your business? A. Real estate department for the United Cigar Stores, now the Irving Trust Company, trustee.

Q. Prior to the bankruptcy of United Cigar Stores Company on August 29, 1932, you were

94 connected with the United Cigar Stores Company? A. I was.

Q. In the real estate department? A. Yes, sir.

Q. For how long a time had you been connected in that way? A. Thirteen years prior to 1933.

Q. What are your duties or what were your duties for the United Cigar Stores immediately prior to the bankruptcy? A. Securing locations and renewals of leases with landlords.

Q. With the trustee are your duties approximately the same? A. The same thing.

95 Q. Are you acquainted with the property which is referred to as No. 45 East State Street, in the City of Trenton, State of New Jersey? A. I am.

Q. The size of that property is approximately eighteen and a half by sixty-five feet?

The Master: Now just a minute. Off the record.

(Further discussion off the record.)

Mr. Kellogg: Your Honor, a copy of the lease is annexed to the stipulation which has been offered here.

(Further colloquy off the record.)

96 The Master: The next question.

Q. How would you describe this in the parlance as a chain store location, Mr. Sientz? A. I would consider it one of the best corners in the City of Trenton.

Mr. Glenn: May I interrupt, are you putting Mr. Sientz on the stand as a real estate expert?

The Master: Yes, as I understand it.

Mr. Kellogg: I am.

The Master: Frankly, I do not think you ought to spend much time on this, because Mr. Bugbee who is the owner of the other portion of the premises and former comptroller of the State of New Jersey, has been dealing with real estate all his life and his testimony was to the effect that it was the best corner in Trenton. 97

Mr. Kellogg: Of course, that is not in this record, your Honor.

Q. You have heard the testimony of Judge Wise in this proceeding? A. Yes.

98

Mr. Glenn: May I ask a few questions, your Honor?

The Master: Yes.

Cross examination by Mr. Glenn:

Q. I take it that you negotiated the lease with the United on the property known as the Fischer Estate property? A. Not on the Fischer property. I did on the Bugbee property.

Q. Did you ever negotiate leases on any other property in the City of Trenton? A. Yes.

Q. What other leases? A. Those are the only two stores we had in Trenton. 99

Q. Did you ever live in the City of Trenton? A. No, sir, I did not.

Q. What experience other than what has been elicited from you so far have you had in connection with leasing stores for the company? A. I have leased stores for the company in the entire State of New Jersey.

Q. But you know nothing about real estate conditions in Trenton? A. Yes, as far as rental values are concerned.

Michael I. Sientz—for Trustee and Interrenors—By Master.

100

Q. Based upon what experience? A. Checking up other locations.

Q. You mean you go over from New York City? A. From New York City.

Q. And you had actually negotiated in Trenton two leases and that is all? A. That is all in the City of Trenton.

Mr. Glenn: I object to this man as being an expert on real estate values in the City of Trenton.

101 The Master: Objection overruled. He has had considerable experience in the State of New Jersey. I think he is qualified as an expert.

Mr. Glenn: On that basis, your Honor, these people in the United would be experts of real estate all over the country, which is impossible.

The Master: Off the record.

(Further discussion off the record.)

Examination by the Master:

Q. Mr. Sientz, as a matter of fact, as part of
102 your duty you contact other chain store representatives in other lines? A. Yes, sir.

Q. And you are familiar with renting conditions throughout the State of New Jersey? A. Throughout the State of New Jersey and other States.

Q. And the United has other stores in other sections of New Jersey near Trenton? A. Elizabeth, New Brunswick, Summit, Newark, almost every city in the State of New Jersey of any consequence.

Mr. Glenn: I say that is all immaterial, irrelevant, your Honor.

103

The Master: I disagree with you, Mr. Glenn. Objection overruled. Exception.

Re-direct examination by Mr. Kellogg:

Q. Mr. Sientz, before making the lease in the City of Trenton that you refer to, did you canvass the city for locations and ascertain the prices for those locations? A. I tried to check up on other rental values in the city.

Q. Have you recently attempted to check up on rental values? A. The last time I was there was prior to the end of last year.

104

Q. You have contacted, however, real estate men in the City of Trenton so that you have obtained their views as to the real estate rental values in the City? A. In the City of Trenton and elsewhere.

Q. I am not sure whether I asked this question or not: You heard the testimony of Judge Wise? A. I did.

Q. And you agree entirely with his testimony? A. Yes, sir.

Q. As far as you are able to judge at the present time this property is not deteriorating or going downhill? A. Absolutely not.

105

The Master: Cross examination?
Mr. Glenn: I have nothing.
The Master: Off the record.
(Further discussion off the record.)

Examination by Mr. Kellogg (continuing):

Q. Mr. Sientz, will you please tell me whether Trenton is a city of diversified industries or of one interest? A. Diversified industries.

106 Q. What other industries are located there? A. Terra Cotta goods, rubber goods, china, Roebling works—that is a steel works right outside of the city.

Mr. Glenn: Pardon me, your Honor, I fail to see how this witness can testify as to what industries are located in the City of Trenton.

May I ask a question?

The Master: Yes.

107 Cross examination by Mr. Glenn:

Q. Have you actually visited the industrial plants which produce these products in the City of Trenton? A. I don't have to necessarily visit the plants.

Q. Of your own actual knowledge you do not know whether these products are manufactured in the City of Trenton or not? A. I answered that I do know.

Q. How do you know? A. Well, all you have to do is just to go down there by train. You can see them all along the railroad tracks and not very far from the city.

108

Q. By going through by train you can tell what they manufacture? A. Yes, you can see the plants. Or, by driving down by automobile. I believe they have their advertising motto right on it, what they manufacture, the names of the firms.

Q. And that is the basis on which you have testified? A. Yes.

Mr. Glenn: Proceed.

109

Re-direct examination by Mr. Kellogg:

Q. What would you consider that the City of Trenton is particularly noted for in its manufacture? A. China. The Lenox china is manufactured down there.

Q. It is the center of the pottery industry? A. Yes.

Q. Has the City of Trenton suffered more from the present depression than other cities of similar sizes, if you know? A. That is a question I would not know definitely.

110

Q. But you do not know definitely that it has? A. No, I do not.

Mr. Kellogg: That is all.

The Master: Cross examination?

Mr. Glenn: No questions.

The Master: Anything else?

(Thereupon, the witness was excused.)

The Master: The only thing left for me to do is to fix a time for the briefs.

How much time do you want, Mr. Glenn?

111

Mr. Kellogg: We would like quite a little time, your Honor.

(Further discussion off the record.)

The Master: July 8th for Claimant's brief. Is that satisfactory?

Mr. Glenn: Yes.

The Master: How much time do the intervenors and the trustee want? Or, isn't the trustee going to file one in this case?

Mr. Swatland: I think we may.

112 The Master: How much time do you want after the 8th?

Mr. Swatland: I think two weeks.

The Master: All right, is that satisfactory to everybody, July 22nd? (No response.)

July 22nd for reply memoranda; July 26th for answering memoranda; entire matter to be submitted on the 26th at which time you will file your exhibits.

(Further discussion off the record.)

Mr. Tuttle: Your Honor, we would like to file a memorandum in this case.

113 The Master: You can. You are one of the intervenors.

(Thereupon, at 3:25 o'clock, P. M., the hearing was closed.)

114

Claimants' Exhibit A.

115

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor. 116

STIPULATION OF FACTS RELATING TO CLAIM OF CAROLINE R. KUEHNER AND FREDERICK G. FISCHER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ADAM FISCHER, DECEASED, AGAINST UNITED CIGAR STORES COMPANY OF AMERICA (No. 5184).

The following facts are agreed to by and between the undersigned in lieu of formal proof thereof:

On October 18, 1926, Edward A. Fischer and 117
Caroline R. Kuehner, as executors of and trustees under the will of Adam Fischer, deceased, were the legal owners in fee of the premises hereinafter referred to, and Edward A. Fischer and Caroline R. Kuehner, individually, and Frederick G. Fischer, Margaret G. Fischer, Margarette Hensler, Louis Fischer, Jr., and Ruth Fischer were the then living beneficiaries of the trust of said premises created under the will of said Adam Fischer, deceased. Said premises were demised under a certain indenture of lease which the aforesaid

118 persons, as landlords, made on October 18, 1926, to United Cigar Stores Company of America, as tenant. The terms and provisions of said lease are set forth in full in Exhibit "A", annexed to this stipulation.

On the 24th day of December, 1933, Edward A. Fischer died, and on April 20, 1934, Frederick G. Fischer was duly appointed and qualified as successor trustee under the last will and testament of Adam Fischer, deceased, in the place and stead of said Edward A. Fischer, deceased. At all times after the 24th day of April, 1934,
119 Caroline R. Kuehner and Frederick G. Fischer, as trustees under the last will and testament of Adam Fischer, deceased, were, and they still are, the legal owners in fee of said premises said legal owners being herein called the "Claimants".

United Cigar Stores Company of America, the corporation which is the Debtor in the above-entitled proceeding for reorganization, hereinafter called the "Debtor", on August 29, 1932, filed its voluntary petition in bankruptcy and was adjudicated a bankrupt in the bankruptcy proceeding initiated thereby (Docket No. 55,129), and Irving Trust Company was appointed trustee in
120 bankruptcy of the Debtor and acted as such trustee in bankruptcy (hereinafter called the "Trustee in Bankruptcy") until June 14, 1934. On June 9, 1934, the Debtor filed its petition for reorganization under Section 77B of the Bankruptcy Act, and on June 14, 1934, the above-mentioned court made its order approving such petition as property filed under said section. On November 14, 1932, the Trustee in Bankruptcy formally rejected the above-mentioned lease and surrendered the premises covered by said lease to the Claimants as landlords. After rejection and surrender of the premises by the Trustee in

Bankruptcy, the Claimants re-entered into and upon the whole of said premises. 121

On or about the 14th day of November, 1932, Charles N. Schragger, a duly licensed real estate broker doing business in the City of Trenton, New Jersey, was authorized and empowered to let said premises, but no person offered to lease said premises except the following, who became tenants of the Claimants at the following times and under the following terms:

A portion of the premises was relet to Sa Lee Shoppe, Inc., on March 1, 1933, under a lease the terms and provisions of which are set forth in full in Exhibit "B", annexed to this stipulation. 122

A portion of the premises was relet to Barney E. Olitsky on July 26, 1933, under a lease the terms and provisions of which are set forth in Exhibit "C", annexed to this stipulation.

A portion of the premises was relet to Charles C. Wacks on July 15, 1934, under a verbal agreement for a month to month tenancy, commencing on July 15, 1934, at the rate of $20.00 per month. 123

A portion of the premises was relet to one Piat (first name unknown) on May 1, 1934, under a verbal agreement for a month to month tenancy, commencing on May 1, 1934, at the rate of $25.00 per month.

A portion of the premises was relet to E. A. Devlin on January 1, 1933, under a verbal agreement for a month to month tenancy, commencing on January 1, 1933, at the rate of $22.50 per month.

Claimants' Exhibit A.

124 No part of the premises has been relet since the aforesaid rejection of said lease, except as aforesaid.

Neither the Debtor nor the Trustee in Bankruptcy nor any other person has paid the rent or any other obligations accruing under said lease dated October 18, 1926, after the 1st day of August, 1932, except as hereinafter mentioned,—that is to say: no instalment of net rent under said lease has been paid since the instalment of rent under said lease due on August 1, 1932; no instalment of taxes has been paid under said
125 lease since the instalment paid on or about June 1, 1932, such instalment being for the first half of the year 1932; no water rents have been paid under said lease since August 29, 1932; and no premiums on the fire insurance required to be maintained by the tenant under the provisions of Article Ninth of said lease dated October 18, 1926, have been paid thereunder since the premium paid for 1932. The last water rents paid by the Debtor covered the year 1932, and the last premium on fire insurance paid by the Debtor covered the year 1932.

The Claimants received dividends amounting to
126 $1,110.34, which were declared in the above-mentioned proceedings in which the Debtor was adjudicated a bankrupt (Docket No. 55,129) on the claim based on said lease filed by them in said bankruptcy proceeding.

The amount received by the claimants from the Trustee in Bankruptcy of the Debtor for the use and occupation of the premises by the Trustee prior to its surrender of the premises upon rejection of said lease is $646.74.

The amount of the taxes levied and assessed against, on or in respect of said premises for

the years 1932, 1933, 1934 and the first half of 1935 is as follows: 127

1932	$3,980.40
1933	$2,907.09
1934	$3,142.80
1935 (first half)	$1,571.00

The amount of water rents paid for or in respect of said premises for the years 1933, 1934 and for a part of 1935 is as follows:

1933	$ 9.93 (premises only
1934	$55.78 partly occupied 128
1935 (to date)	$ 9.93 during 1933.)

The amount of premiums on fire insurance in the amount of $25,000 on the building on said premises, in respect of the years 1932, 1933 and 1934, are as follows:

1932	$159.50
1933	$159.50
1934 ($35,000)	$223.30

The amount received from said new tenant Sa Lee Shoppe, Inc., under said lease dated March 129
1, 1933 (Exhibit "B"), from the date of the commencement of the term of said lease, to wit, April 1, 1933, to date, is $10,125. The amount of the gross sales of said tenant Sa Lee Shoppe, Inc., for the year ending March 31, 1935, was $44,864.33. No rent has to date been received from nor is payable by said tenant Sa Lee Shoppe, Inc., on account of the gross sales clause contained in said lease (Exhibit "B").

The amount received from said new tenant Barney E. Olitsky under said lease dated July

130 26, 1933 (Exhibit "C"), from the date of the commencement of the term of said lease, to wit, October 21, 1933, to date, is $1,200, although $100 more was due and payable by said tenant under the terms and conditions thereof.

The amount received from said new tenant Charles C. Wacks from the date of the commencement of his tenancy on July 15, 1934, to date, is $220, although said tenant agreed to pay a rental of $20.00 per month during the period of his tenancy.

The amount received from said new tenant
131 Piat from the date of the commencement of his tenancy on May 1, 1934, to date, is $325, although said tenant agreed to pay a rental of $25.00 per month during the period of his tenancy.

The amount received from said new tenant E. A. Devlin from the date of the commencement of his tenancy on January 1, 1933, to date, is $652.50, although said tenant agreed to pay a rental of $22.50 per month during the period of his tenancy.

On October 5, 1934, Frederick G. Fischer and Caroline R. Kuehner, individually and as trustees under the last will and testament of Adam
132 Fischer, deceased, and also as duly authorized agents for the ultimate beneficiaries under said Will, filed in the office of Special Master Irwin Kurtz, 15 Park Row, New York City, the proof of claim which is now on file in the office of said Special Master and which has been numbered 5184, and which as such constitutes a part of the record on the claim set forth in said proof of claim.

The Claimants have at no time assigned to any person such claim as they may have against the Debtor as a result of the facts hereinabove set forth.

Claimants' Exhibit A.

This stipulation is made without prejudice to 133
the right of any of the undersigned to object to the admission of this stipulation in whole or in part on the ground that it or any part thereof is irrelevant or immaterial, but all other possible grounds of objection to its admissibility or to the admissibility of any of the facts herein agreed to are hereby waived.

Dated, June 21st, 1935.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders, 134
Protective Committee.

BERLE & BERLE, SHEARMAN & STERLING,
Attorneys for Preferred Stockholders,
Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation.

M. CARL LEVINE,
Attorney for Jacob Ruppert
Realty Corporation. 135

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for the Trustee of the Estate of United Cigar Stores Company of America.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for the Claimants.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Landlords' Protective Committee.

Claimants' Exhibit A.

136

EXHIBIT A.

LEASE TO DEBTOR.

INDENTURE made this 18th day of October, 1926, by and between EDWARD A. FISCHER and CAROLINE R. KUEHNER, individually and as Executors and Trustees of the Estate of Adam Fischer, late of Trenton, in the County of Mercer, State of New Jersey, and FREDERICK G. FISCHER, MARGARET G. FISCHER, MARGARETTE HENSLER, LOUIS FISCHER, JR. and RUTH FISCHER, hereinafter called "Landlords" and UNITED CIGAR STORES COMPANY OF
137 AMERICA, a New Jersey Corporation, having an office at No. 44 West 18th Street, Borough of Manhattan, City and State of New York, hereinafter called "Tenant", WITNESSETH:

That the Landlords for and in consideration of the rent and covenants hereinafter contained on the part of the Tenant to be paid, kept and performed, have demised and leased and do by these presents demise and lease unto the Tenant and the Tenant does hire from the Landlords, that certain piece or parcel of land situate, lying and
138 being in the City of Trenton, County of Mercer and State of New Jersey, known as and by the Street No. 45 East State Street, and being more particularly described as follows:

BEGINNING on the south side of State Street in the said City of Trenton, at the corner of a lot of Joseph G. Brearley and others and running from thence (1) by said lot south seven (7) degrees west sixty-four (64) feet more or less to other land of said Brearley; thence (2) by said land north eighty-eight and a half (88½) degrees West, twenty-one

(21) feet to the lot of William J. Owens; 139
thence (3) by said lot of said Owens, North eleven (11) degrees East, sixty-six (66) feet more or less to State Street; and from thence (4) by said State Street South seventy-nine (79) degrees East, eighteen (18) feet and six (6) inches to the place of Beginning.

TOGETHER WITH the four story building and improvements thereon erected and the appurtenances thereunto appertaining, for a term of years commencing on November 1st, 1926, and expiring on March 31st, 1946, subject to termination as hereinafter provided; YIELDING AND PAYING THEREFOR 140
unto the said Landlords the yearly rental of Ten Thousand Five Hundred Dollars ($10,500.00) for the first ten (10) years of the term, and the yearly rental of Eleven Thousand Five Hundred Dollars ($11,500.00) for the balance of the term, which rental shall be payable in equal monthly payments in advance on the first day of each and every month during the term hereof. The tenant agrees as a convenience to the Landlords, to pay the first two (2) years' rental in the following manner: Four Thousand Two Hundred Sixty-five and 84/100 ($4265.84) upon execution of this lease, 141
receipt of which is hereby acknowledged, and on the first day of each and every month of the first two (2) years of the term hereof the Tenant shall pay to the Landlords the sum of Eight Hundred Seventy-five Dollars ($875.00) less the sum of One Hundred Seventy-seven and 75/100 Dollars ($177.75) and less a sum equal to six per centum (6%) per annum on all unearned prepaid rental.

This lease is made upon the following conditions, all and every one of which the respective parties covenant and agree to and with each other to keep and perform:

142 FIRST: The Tenant shall and will monthly and every month during the said term hereby granted, well and truly pay or cause to be paid unto the Landlords at No. R. F. D. 6 Trenton, N. J., Trenton, New Jersey, or at such other place as they may designate in writing, the said rent hereby reserved upon the days and at the times hereinbefore limited and prescribed for the payment thereof without fraud or delay, and shall and will at its own proper cost and charges pay and discharge as additional rent hereby reserved all taxes and assessments of every nature, kind and de-
143 scription which may be levied or assessed against said property by the City of Trenton, or State of New Jersey, or other Governmental instrumentality, and all water rents, but nothing herein contained shall be deemed or construed to obligate Tenant to pay any income, inheritance or franchise taxes, or taxes other than those imposed directly upon demised premises. The Tenant agrees to pay the taxes semi-annually upon the twenty-fifth days of April and October in each year, and to pay all assessments and water rents that shall be assessed, levied and imposed upon said property and become due and payable during
144 the said term as and when levied and due; provided, however, that the Tenant shall not be required to pay any part of any assessment upon the demised premises which has been levied, assessed, confirmed and/or become a lien prior to date of commencement of term hereof, and that in case of assessments confirmed after date of commencement of term hereof, and which may become a lien during the term herein demised and may be payable (upon application by the Landlords or otherwise) in installments, the Tenant shall only be obligated to pay such installments

as shall fall due during the term of this lease, or 145
if application by the Landlords is necessary under the law to permit of the payment of such assessments in installments and such application has not been made, the Tenant shall in that event only be obligated to pay such part thereof as would equal and represent the installments due thereon during the term herein demised, if the same were so divided and made payable in installments. It is expressly understood and agreed, however, that taxes for the first and last calendar years of the term, shall be apportioned between the parties hereto based upon the period of occupancy by the Tenant hereunder. 146

The Tenant shall have the right to contest or review by legal proceedings or in such other manner as it deems suitable, which proceedings if instituted shall be conducted promptly at its own expense and free of expense to the Landlords (but Landlords covenant and agree to join in such application if required by the laws, requirements, regulations or authorities wherein the premises are located) any taxes, assessments or water rents imposed upon or against the demised premises, and in case any such taxes, assessments or water rates shall as a result of any such pro- 147
ceedings or otherwise, be reduced, cancelled, set aside or to any extent discharged, then upon the determination of such proceedings, the Tenant shall pay the amount that shall be finally assessed or imposed against said premises or be adjudicated to be due and payable on any such disputed or contested items; and shall also have the right to contest any orders or requirements of any governmental authority or otherwise directing or ordering the making of any alterations, repairs or changes to the demised premises, but any such

alterations, repairs and/or changes which may be finally required to be made shall be made by and at the expense of the Tenant; and the Landlords, do hereby make, constitute and appoint the Tenant their true and lawful attorney in fact in their name or in the name of the Tenant as their agent, to file any tax protest or other papers necessary or required in connection with any of the foregoing and at Tenant's cost and expense to take and prosecute any and all proceedings and take advantage of any remedies which in Tenant's opinion shall be necessary and/or proper in relation thereto. The legal proceedings herein referred to shall include appropriate appeals from any judgments, decrees, orders and/or certiorari proceedings and appeals from orders therein but all such legal proceedings shall be begun as reasonably soon as possible after the imposition of any contested lien and shall be prosecuted to final adjudication with all promptness and dispatch.

SECOND: The Tenant covenants and agrees during the term hereby granted, at its own expense, to promptly execute and comply with all laws, rules, orders and regulations of the State, County and Municipal Governments and of any and all their departments and bureaus which may affect or be applicable to the said demised premises and the sidewalks and curbs in front thereof.

THIRD: And the Tenant does hereby covenant with the Landlords that the Tenant, during the said term, will keep the said premises in as good order and repair as when delivered to it, damage by fire or other casualty of happening excepted; and will keep good with glass of the same kind

and quality as that which may be injured or 151
broken, all the glass now or hereafter in the premises, unless the same shall be broken by fire, but provided that in the event that any of said glass shall be broken or damaged by any cause before the commencement of the term herein demised, the same shall be replaced at the expense of the Landlords, and at the expiration of the term the Tenant will remove its goods and effects, and will peaceably yield up to the Landlords the said premises, in as good order and repair as when delivered to it, damage by fire, casualty or act on the part of any Governmental authority, or- 152
dinary wear and tear and damage by the elements excepted.

FOURTH: It is agreed that the Tenant may assign or transfer this lease at any time without the consent of the Landlords, provided there shall be at the time of such assignment no existing default on the part of the Tenant in the performance of any of the matters and things to be performed by it under the terms hereof, provided that the assignee shall expressly and in writing assume and agree to perform the Tenant's liabilities and obligations hereunder and that the Ten- 153
ant shall deliver to the Landlords duplicate original of such instrument of assignment containing an express covenant on the part of the assignee to assume and perform all the liabilities and obligations of the Tenant hereunder: provided further, however, that the Tenant shall at all times and by these presents does guarantee the just and full performance and discharge of all the terms, covenants and obligations of the Tenant hereunder by any such assignee or assignees and shall and does undertake and agree to in-

demnify and save the Landlords harmless from any and all loss or damage which they might otherwise suffer by reason of any failure or default by the said assignee or assignees in the said performance and discharge thereof. The Tenant may sublet the demised premises or any part thereof for any lawful business or purpose.

FIFTH: That during the term the Tenant will not consent that any trade or occupation shall be carried on upon said premises or any use made thereof which shall be unlawful or contrary to any law of the United States, State of New Jersey, or ordinance or by-laws of the City of Trenton, for the time being in force.

SIXTH: The Tenant shall have the right and privilege at its own cost and expense from time to time during the term to make alterations, changes and improvements in and additions to any building and improvement now or hereafter on the land forming part of the demised premises, and to remodel any of such buildings and/or improvements in such manner as it shall deem advisable, and shall have the right and privilege of demolishing in whole or in part the present or any future building, structure or improvement on such land, and if a building is demolished to erect in lieu thereof another building, built of good substantial material, equal in value to the building now erected on land forming part of demised premises; all such alterations, improvements, repairs, remodeling, demolitions and erections to be performed in accordance with all laws, ordinances, statutes and rulings of the City of Trenton and County of Mercer and State of New Jersey applicable thereto. The Landlords do

hereby make, constitute and appoint the Tenant 157
their true and lawful attorney in fact in their name or in the name of the Tenant as their agent, to file, or Tenant may file in its own name, any and all applications, consents and other instruments that may be necessary or required by any and all public or quasi-public authorities permitting and authorizing such alterations, changes, improvements, additions, demolitions and/or erection of any new buildings; and the Landlords covenant and agree if demanded by the Tenant at any time after the execution of this lease to properly execute or cause to be properly executed 158
and deliver to the Tenant any such applications, covenants and/or other instruments hereinbefore referred to.

It is agreed that the Tenant shall have the right, if it so desires, in constructing any new building on land forming part of demised premises, to construct the said new building in such manner that the same may form a part of any building constructed on the adjoining premises and to be used in connection therewith as a single building or block; provided, however, that said building shall be so constructed that at the expiration of the term of this lease, the part or parts thereof 159
located on said premises may, if the Landlords so desire, be separated each from the other by a division or party wall. In case such new building be so constructed in such manner, the Tenant shall, on or before the date of expiration of the term of this lease, if so required by the Landlords by thirty (30) days' prior notice in writing before the end of such term, construct such a division wall of good and durable materials and in a good and workmanlike manner, at its own cost and expense so that the part or parts of said building

160 on said demised premises shall be completely separated from and independent of the wall or walls on adjoining premises.

The Tenant covenants and agrees that if in the making of alterations and changes to building now on demised premises, it shall remove from upper portion of building above street floor, wash-tubs, bathtubs, plumbing, built-in-beds or fixtures, the salvage thereof shall be the property of Landlords.

The Tenant shall also have the right, in making any alterations, changes or improvements to any
161 building forming a part of demised premises, to connect up the same with any adjoining building or buildings and to remove any wall or walls of demised building for that purpose, provided at the expiration of the term of this lease, if the Landlords so require by thirty (30) days' prior notice in writing before the end of term, to restore walls of building to the condition as good as at present, at the expense of the Tenant.

The Tenant covenants and agrees to indemnify, hold harmless and protect the Landlords from and against all claims, demands, fines, liens, suits, judgments, loss and damage of any and every
162 nature, directly or indirectly arising or growing out of the said alterations, changes, improvements, additions, demolitions and/or erection of new building.

Upon the termination of this lease, Tenant agrees, if so required by the Landlords, to restore said building to its present condition and layout in all respects, and particularly to its present condition and layout in so far as accessibility to the upper floors thereof from the street is concerned.

SEVENTH: The Landlords covenant and agree

that the demised premises will be delivered to the Tenant upon the commencement of the term of this lease in good order, repair and condition and free from all tenancies and occupancies, and free from all taxes, assessments, mortgages (excepting as herein otherwise provided) liens and encumbrances whatsoever, and free from all orders and notices of violations of all public and quasi-public authorities and free from complaints and/or reports of violations noticed or existing in or filed with any Federal, State, County or Municipal authorities. 163

EIGHTH: It is agreed that the Lessor may, during the term at reasonable times enter to view the premises and may show the said premises and building to others, and at any time within three months next before expiration of the said term may affix to any suitable part of the said premises a notice for letting or selling the premises, or building, and keep the same affixed without hindrance or molestation. 164

NINTH: The Tenant shall, at its own expense, insure the building forming part of demised premises in the sum of Twenty-five Thousand Dollars ($25,000.00) in a good and reliable insurance company or companies authorized to do business in the State of New Jersey in the name of and for the benefit of Landlords and shall keep the said building so insured during the entire term of this lease, and all premiums upon said insurance policies shall be paid by Tenant and shall be considered as part of the rent hereunder, and all said policies are to be delivered to and remain in the custody of the Landlords; provided, however, that if at any time, by reason of additions, alterations or changes in the present building, or by rea- 165

166. son of the erection of a new building or buildings on the demised premises, the full insurable value thereof shall be such that the sum of Twenty-five Thousand Dollars ($25,000.00) is less than eighty per centum (80%) of said insurable value, then the amount of said insurance so agreed to be kept in force by the Tenant for the benefit of the Landlords, shall be increased so that the said building or buildings on said premises shall at all times be insured in an amount equal to or in excess of eighty per centum (80%) of the full insurable value thereof.

167 In the event that any present or future building erected on the land forming part of demised premises shall be partially damaged by fire or other casualty or happening during the term it shall be restored to its condition immediately prior to such damage with due diligence by Landlords and all insurance moneys collected upon any policies of insurance upon demised premises shall be paid over to Landlords, and the rent and taxes payable by Tenant, until such repairs shall have been made, shall be apportioned in proportion to the part of the building which is still usable.

168 In case any present or future building erected upon the land forming part of demised premises shall be substantially destroyed by fire or other casualty or happening prior to April 1st, 1942, then Landlords shall erect with due diligence a new building upon the land forming part of demised premises substantially similar to the building so destroyed and all insurance moneys collected upon any policies of insurance upon demised premises shall be paid over to the Landlords and any unearned rent and/or taxes paid in advance by Tenant shall be refunded to Tenant. The rent and taxes payable hereunder by Tenant

shall abate pending construction of the new build- 169
ing by Landlords and until the said building is ready for use and occupancy by Tenant.

In case any present or future building erected upon the land forming part of demised premises shall be substantially destroyed by fire or other casualty or happening after March 31st, 1942, this lease shall cease and come to an end as of the date of such destruction and any unearned rent and taxes paid in advance by the Tenant shall be refunded to it.

In the event that any building forming part of demised premises shall be partially damaged or 170
destroyed prior to the beginning of the term hereof, this lease shall not be affected thereby, but the said building shall be restored to its condition immediately prior to such damage or destruction with due diligence by Landlords, and no rental shall be due or payable, nor shall this lease commence until such premises have been properly restored and fitted for use and occupancy by Landlords.

TENTH: Provided also, and these presents are upon this covenant, that if the Tenant does or shall neglect or fail to perform or observe any of the covenants contained in these presents and on 171
its part to be observed and performed for ten (10) days after notice by the Landlords, or if the estate hereby created shall be taken on execution, and such execution shall not be satisfied, cancelled or otherwise removed within thirty (30) days after notice by Landlords, or if the Tenant shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said cases the Landlord lawfully may enter into and upon the said premises or any part thereof in

172 the name of the whole and repossess the same as of the former estate of the Landlords and expel the Tenant and those claiming under and through it and remove its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine and the Tenant covenants that in case of such termination it will indemnify the Landlords against all loss of rent which the Landlords may incur by reason of
173 such termination, during the residue of the term above specified.

ELEVENTH: It is further covenanted and agreed by and between the parties hereto that during the term of this lease, the Landlords will not sign any petition, consent or other instrument in writing whereby any person or corporation other than the Tenant or those claiming under it, shall directly or indirectly acquire the right to use or occupy any portion of any street or alley upon which said property abuts, or the space above or under the surface thereof, without the written consent of
174 Tenant, but in all cases where by law the consent or petition of the owner of the property in question is required for any public grant or for any public improvements, the consent or petition of the Tenant shall bind the premises and the parties.

TWELFTH: This lease shall be subject and subordinate to any mortgages now or hereafter placed against said premises, which mortgages are not to exceed in the aggregate the principal sum of Thirty-five Thousand Dollars ($35,000.), and the recording of such mortgage or mortgages shall

have preference and precedence and be superior 175
and prior in lien to this lease irrespective of the
date of recording and the Tenant agrees to exe-
cute any instrument without cost which may be
deemed necessary or desirable to further effectuate
the subordination of this lease to any such mort-
gage or mortgages; and it is agreed between the
parties hereto that in the event of any default
by Landlord under the provisions of any such mort-
gage or mortgages or bond or bonds, which it or
they secure, by reason of which a proceeding is
instituted or threatened for the foreclosure of said
mortgage or mortgages, then the Tenant shall 176
have the right and privilege of remedying such de-
fault at the cost and expense of the Landlords, in-
cluding the right to pay any interest or principal
or other sum due thereunder, and also including
the right to the Tenant of procuring a new mort-
gage loan in substitution for any such mortgage
or mortgages, and the Landlord covenants and
agrees upon demand to execute any new bond
and/or mortgage or other papers necessary or
required to effectuate such new mortgage loan or
loans and to repay to the Tenant upon demand
the cost and expense incurred by the Tenant, in-
cluding costs in such foreclosure proceedings and 177
reasonable counsel fees, and reasonable costs, in-
cluding counsel fees of procuring any such sub-
stitute mortgage loan, if necessary, and in addi-
tion to any other rights and remedies which the
Tenant may have at law or in equity, or under
this lease, the Tenant shall likewise have the right
and privilege of reimbursing itself to the extent of
such sums so incurred as aforesaid, out of rentals
then or thereafter falling due hereunder. Land-
lords agree and covenant that in the event they
shall be called upon by Tenant to execute and/or

deliver any new mortgage or mortgages, bond or
178 bonds or papers hereunder, that Landlord will, if required by Tenant or any new mortgagee, have said mortgage, bond or other papers duly executed, acknowledged and delivered by his wife if he at the time shall be married.

THIRTEENTH: All notices required or agreed to be given by either party shall be in writing and given by personal delivery to the Landlords or to one of the executive officers of the Tenant or shall be sent by registered mail addressed to the party intended to be notified at its last known post office address and notice given as aforesaid shall be a
179 sufficient service thereof.

And the said Landlords do covenant that the said Tenant on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

FOURTEENTH: And it is further understood and agreed that the covenants and agreements contained in the foregoing Lease are binding upon the parties hereto and their respective heirs, executors, administrators, successors, legal representatives and assigns.

180 IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and affixed their respective seals the day and year first above written.

In Presence of:

LOUIS RUDNER

EDWARD A. FISCHER (L. S.)
CAROLINE R. KUEHNER (L. S.)
Individually and as Executors and Trustees of the Estate of Adam Fischer, deceased.

FREDERICK G. FISCHER (L. S.)

Claimants' Exhibit A.

As to LOUIS FISCHER, JR.
JOSEPH FISHBERG

181

MARGARET G. FISCHER (L. S.)
MARGARETTE HENSLER (L. S.)
LOUIS L. FISCHER, JR. (L. S.)
LOUIS FISCHER, JR. (L. S.)
RUTH FISCHER (L. S.)

UNITED CIGAR STORES COMPANY
OF AMERICA,
By GEO. J. WISE,
Vice President.
(Seal)

182

W. A. FERGUSON,
Secretary.

The Rider attached hereto as part of Paragraph 6 hereof and on page 9 hereof was annexed hereto prior to the execution of this lease by any of the parties thereto.

EDWARD A. FISCHER,
CAROLINE R. KUEHNER,
Individually and as Executors and Trustees of the Estate of Adam Fischer, deceased.

183

UNITED CIGAR STORES COMPANY
OF AMERICA,
By GEO. J. WISE,
Vice President.

(Acknowledgments.)

Claimants' Exhibit A.

184 EXHIBIT "B".

THIS INDENTURE, made this 1st day of March, 1933, between,

EDWARD A. FISCHER AND CAROLINE R. KUHNER, Executors of the Estate of Adam Fischer, party of the first part, hereinafter called the Lessor, and

SA LEE SHOPPE, INC., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of Newark, County of Essex
185 and State of New Jersey, party of the second part, hereinafter called the Lessee.

WITNESSETH that the party of the first part in consideration of the rent, conditions, covenants and agreements hereinafter provided for on the part of the party of the second part to be paid, kept and performed, does hereby lease unto the said lessee, the ground floor premises, measuring approximately 50'x18'4" from the window backs and basement located at #45 East State Street, in the City of Trenton, County of Mercer and State of New Jersey, said storeroom to be according
186 to the plans and specifications herewith attached and made part of this lease for the term of five years from April 1st, 1933 to April 1st, 1938.

During the term of this lease the Lessee shall pay to the Lessor a rental, as provided, in the next succeeding paragraph hereof, of eight per cent. (8%) of the gross sales made at the said demised premises during the year from April 1st, to April 1st.

To this end the Lessee shall, within the first ten (10) days of each month, send to the Lessor

a statement in writing, signed in the name of the 187
Lessee, by its President, vice-president, Treasurer or Secretary, which statement shows said gross sales in the demised premises.

The Lessee hereby agrees to guarantee to the Lessor under the term of this lease, a rental of not less than $4500.00 per annum, payable monthly at the rate of $375.00, payable on the first day of each month for the current month in advance, and agrees at the end of each three months' period, beginning as of April 1st, 1933, to calculate the rent due the Lessor for the next preceding three months' period under the terms of 188
this lease at the rate of 8% of the gross sales for the said three months' period and deducting the amount of rent as paid under the minimum guarantee herein provided for and paying on the 10th of the next month thereafter the difference which shall have been earned as rent according to such calculation. It being the intention of the parties hereto that the rental for the premises herein demised shall be at the rate of 8% of the gross sales for an entire year during the term of this lease but the Lessee guarantees a minimum rental of $4500.00 per annum, payable $375.00 per month, in advance. At the expiration of each 189
12 month period, during the terms of this lease, the gross sales will be computed and the amount to be paid is at the rate of 8%. Adjustments for the entire year, in accordance with the above to be made each twelve months' period commencing April 1st, 1934.

The Lessor agrees to install a front and make improvements according to the attached plans and specifications at their own cost and expense and agree to give possession of the herein leased

190 premises on or before March 20th, 1933, in a finished condition ready for occupancy by the Lessee.

The said Lessee accepts this lease upon the following covenants, agreements, conditions and limitations, all and every one of which the said Lessee hereby expressly covenants and agrees to keep, observe and perform.

1. The Lessee agrees to permit the Lessor or the Lessor's representative to enter the herein leased premises and examine the Lessee's books at any reasonable time.

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2. The Lessee shall and will, during the said term promptly pay to the Lessor the rent, herein reserved on the days herein prescribed for the payment thereof.

3. The said premises shall be used and occupied for the sale of women's inside and outside apparel of every description excluding shoes and including women's dresses, women's coats, millinery, hosiery, underwear, lingerie, novelty jewelry and allied articles.

192 The Lessor agrees not to permit any of the remaining space in the building of which the herein leased premises form a part to be used for the sale of any of the above mentioned articles or billiard parlor, bowling alley or men's social club.

4. The Lessee shall not assign, let or underlease the within demised premises without first obtaining the written consent and approbation of the Lessor herein.

Claimants' Exhibit A.

5. The Lessee shall take good care of the premises hereby leased, and shall at its own cost and expense make inside repairs to the herein leased premises, except such as may be necessitated by fire and structural repairs; and at the end or other expiration of the term of this lease will peaceably and quietly leave, surrender and yield up the said premises unto the said Lessor in good order and condition, reasonable use and wear thereof and damages by the elements excepted. 193

6. In case of fire the said Lessee agrees to give immediate notice thereof to the Lessor and in case the building erected on the premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the Lessor and the rent adjusted equitably for partial damage creating untenantable, portion; in case the damage shall be so extensive as to render the building untenantable, the rent shall cease until such time as the building shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise, the rent shall be due up to the time of such destruction and then, from thenceforth this lease shall cease and come to an end. 194 195

7. It is expressly understood and agreed that in case the demised premises shall be deserted or vacated, while the rent is unpaid, or if default be made in the payment of the rent for any part thereof as herein specified, or if default be made in the performance of any of the covenants and agreements in this lease, contained on the part of the Lessee to be kept, or if the Lessee shall fail to comply with any of the statutes, ordinances, rules, order, regulations and requirements of the

196 Federal, State and City Government or of any and all their Departments and Bureaus applicable as to its occupancy of said premises, or be adjudicated a bankrupt or make an assignment for the benefit of creditors or take advantage of any insolvency act, and the rent not paid promptly thereafter, terminate this lease and the term thereof, by giving to the Lessee ten (10) days' notice in writing of its intention so to do, and upon the giving of such notice, this lease and the term thereof shall terminate, expire and come to an end on the date fixed in such notice, as if said
197 date were the date originally fixed in this lease for the termination or expiration thereof.

8. The Lessor or agents or representatives of the Lessor shall have the right to enter in and upon said premises with reasonable frequency and at reasonable hours of the day during said term to ascertain if said premises are kept in proper repair and condition.

9. The failure of the Lessor to insist upon a strict performance of any of the terms, conditions and covenants herein shall not be deemed
198 a waiver of any rights or remedies that the landlord may have and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained.

10. The Lessee hereby agrees to carry Plate Glass insurance on the herein leased premises at its own cost and expense.

11. Upon the expiration of this lease, or the abandonment of the premises by the Lessee, the Lessor may enter and take possession of the said

premises and remove all person or persons there- 199
from, without being liable therefor to any person.

12. The Lessee may erect signs on the herein leased premises provided said signs conform to all Federal, State and City Regulations.

13. The Lessor hereby agrees to furnish adequate heat for the herein leased premises as required during the term of this lease at their own expense and the Lessee hereby grants permission to the Lessor to take whatever necessary space is required in the basement to install a heating apparatus, and the Lessee hereby agrees to permit 200
the Lessor or their representatives to have egress and exit to the heating apparatus through the basement only.

The Lessor hereby recognizes Chas. N. Schragger, a licensed broker of the State of New Jersey, as the broker in this lease and agrees to pay him 2% of all the rentals paid the Lessor by the Lessee, in the following manner:

> 2% of the total minimum guarantee for the period of the lease at the execution of this lease and 2% of all additional rentals 201
> paid by the Lessee to the Lessor at the time of such payments.

The Lessor agrees also to pay commission to Chas. N. Schragger, the broker on any renewals that the Lessee may take after the termination of this lease.

IN WITNESS WHEREOF, the party of the first part has hereunto set their hands and seals and the party of the second part has hereunto caused these presents to be signed by its president and

202 attested by its secretary and its corporate seal affixed hereto all on the day and year first above written.

EDWARD A. FISCHER L. S.

CAROLINE R. KUEHNER, L. S.
Executors for the Estate of Adam Fischer.

SA LEE SHOPPE, INC.,
LOUIS S. ROSEN, President.

Signed, sealed and delivered
in the presence of
203
CHAS. N. SCHRAGGER.

Attest:

LENA R. ROSEN,
Secretary.

(Seal)

State of New Jersey,
County of —ss.:

BE IT REMEMBERED that on this 1st day of March, 1933, before me, the subscriber, a Notary
204 Public of N. J., personally appeared, Edward A. Fischer and Caroline R. Kuehner who I am satisfied are the persons named in and who executed the foregoing lease and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

CHARLES N. SCHRAGGER,
Notary Public of N. J.
My commission Exp. Apr. 1936.

Claimants' Exhibit A.

State of New Jersey,
County of Essex—ss.: 205

BE IT REMEMBERED, that on this 1st day of March, 1933, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared Lena R. Rosen, who being by me duly sworn on her oath, says that she is the secretary of the Sa Lee Shoppe, Inc., named in the within instrument; that Louis S. Rosen is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said instrument is such corporate seal and was thereto affixed and said Instrument signed and delivered by said President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed her name thereto as witness. 206

LENA R. ROSEN, Secy.

Sworn and subscribed to before me this
1st day of March, 1933.

ABRAHAM I. MAYER,
An Attorney at Law of New Jersey. 207

Claimants' Exhibit A.

208 EXHIBIT "C"

THIS INDENTURE, made the twenty-sixth day of July, One Thousand Nine Hundred thirty-three, Between EDWARD A. FISCHER & CAROLINE R. KUEHNER, Executors of the Est. of ADAM FISCHER, of the City of Trenton, County of Mercer and State of New Jersey, party of the FIRST PART, and Barney E. Olitsky, of Trenton, N. J., party of the SECOND PART, WITNESSETH, that the said party of the first part have let and by these presents do grant, demise, and to farm let, unto the said party of the Second Part, the entire second floor, situated
209 in the property known as 45 East State Street, Trenton, N. J., with the appurtenances, for the term of Five Years from the twenty-first day of October, One Thousand Nine Hundred thirty-three, at the yearly Rent or Sum of Seven Hundred Eighty ($780.00) to be paid in equal monthly payments of sixty-five dollars, in advance.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all per-
210 sons therefrom. And the said party of the second part does covenant to pay to the said party of the first part, the said yearly rent as herein specified.

The party of the first part at their own cost and expense agrees to do the following: Install transoms in the windows on the second floor premises. Install base plug electrical out-lets as agreed upon. Install three lavatories and toilet where agreed upon. Install gas outlet where agreed upon. Grant the privilege of hanging two Neon signs on the outside of the building. To

grant to the party of the second part the privilege 211
of subletting part of his space. The party of the first part furnishes heat at their own cost and expense during the months that heat is required. And he, the said Barney Olitsky, his executors and administrators, shall and will not, at any time during the said term, let or demise, or in any manner dispose of the hereby demised premises, or any part thereof, for all or any part of the term hereby granted, to any person or persons whatever, nor occupy or use the same in any other manner than as a Dentist's office, Optometrist's office, and general office purposes, without 212
the consent and approbation, in writing, of the said EDWARD A. FISCHER & CAROLINE R. KUEHNER, Executors of the Est. of Adam Fischer, their heirs and assigns, first had for that purpose: And that at the expiration of the said term, the said party of the second part, will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. And the said party of the first part do covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly 213
have, hold and enjoy the said demised premises for the term aforesaid, and hereby grant to the party of the second part the privilege of erecting such partitions as he may deem necessary, also the privilege of moving in when necessary alterations are completed. Receipt of the sum of $65.00 is acknowledged by the party of the first part from the party of the second part as rent from October 21st to November 21st, 1933.

IN WITNESS WHEREOF, the parties hereto have

214 hereunto set their hands and seals on the day and year first above written.

EDWARD A. FISCHER & CAROLINE R. KUEHNER
Executors of the Est. of Adam Fischer.

EDWARD A. FISCHER (L. S.)
CAROLINE R. KUEHNER (L. S.)
BARNEY E. OLITSKY (L. S.)

Witness:

MAURICE D. SANDLER.

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215 **Claimants' Exhibit B.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter

of

216 UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

SUPPLEMENTAL STIPULATION OF FACTS RELATING TO CLAIM OF CAROLINE R. KUEHNER AND FREDERICK G. FISCHER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ADAM FISCHER, DECEASED, AGAINST UNITED CIGAR STORES COMPANY OF AMERICA (No. 5184).

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, that CHARLES N.

Claimants' Exhibit B.

SCHRAGGERG, a real estate appraiser doing business 217
in the City of Trenton, State of New Jersey, is a duly qualified expert on rental values of real estate in the City of Trenton, New Jersey, and particularly real estate situated in the portion of said city in which the premises covered by the lease hereinafter mentioned are situated, and that if called as an expert witness at the hearing to be held before Hon. Irwin Kurtz, as Special Master in the above-entitled proceeding, on the objections to the claim of Caroline R. Kuehner and Frederick G. Fischer, as Trustees under the last will and testament of Adam Fischer, deceased, 218
against the above named Debtor, he would testify as follows:

The fair rental value as of August 29, 1932, of the premises covered by the lease dated October 18, 1926, made by Caroline R. Kuehner and Edward A. Fischer, as Executors of and Trustees under the last will and testament of Adam Fischer, deceased, and others, as landlords, to the Debtor, as tenant, for a term commencing on August 29, 1932, and ending on March 31, 1946, under a lease containing the same provisions as those contained in said lease dated October 18, 1926, except as to the term 219
of the leasehold, is $4,750 a year net. The fair rental value of said premises as of August 29, 1932, for a term commencing November 14, 1932, and ending on March 31, 1946, under a lease containing the same provisions as those contained in said lease dated October 18, 1926, except as to the term of the leasehold, is the same, to wit, $4,750 a year net.

The fair rental value as of November 14, 1932, of said premises for a term commencing on November 14, 1932, and ending on March 31, 1946, under a lease containing the same provisions

as those contained in said lease dated October 18, 1926, except as to the term of the leasehold, is also $4,750 a year net.

That in his judgment there is no substantial difference in the rental values of said premises whether taken as of August 29, 1932, or November 14, 1932, as during this period there was no appreciable change in rental values.

The aforesaid opinion as to the rental value of said premises is based not only upon the change in rental values since the lease between the landlords and the Debtor dated October 18, 1926, was made and August 29, 1932 and November 14, 1932, respectively, but also upon the factor that said premises must now be rented as an inside property separate and apart from the adjoining premises situated on the corner of State and Broad Streets, Trenton, New Jersey, whereas both said premises and said corner premises were rented as a unit to the Debtor by the respective owners thereof on or about October 18, 1926. Said corner premises were relet as a separate unit, under a lease negotiated by Charles N. Schragger, for a term of ten years; that, accordingly, in his opinion there will be no possibility whatever of reletting during said ten-year period the premises covered by the lease dated October 18, 1926, in conjunction with said corner premises.

That the present return from the premises in question is only a net amount of $3,000 a year, but that over the period of approximately fourteen (14) years said premises should return a net annual rental, as previously stated, of $4,750.

This stipulation is made without prejudice to the right of any of the undersigned to object to the admission of this stipulation in whole or

in part on the ground that it or any part thereof 223
is irrelevant or immaterial, but all other possible grounds of objection to its admissibility or to the admissibility of any of the facts herein agreed to, or to the qualification of said witness as an expert witness to give opinion evidence, are hereby waived.

Dated, June 21st, 1935.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee. 224

BERLE & BERLE, SHEARMAN & STERLING,
Attorneys for Preferred Stockholders' Protective Committee.

SULLIVAN & CROMWELL,
Attorneys for United States Corporation.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.
225

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for the Trustee of the Estate of United Cigar Stores Company of America.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for the Claimants.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Landlords' Protective Committee.

Claimants' Exhibit C.

AMENDMENT TO PROOF OF CLAIM ON BEHALF OF FISCHER ESTATE.

226 The claimants pray that if the court should determine that their statutory parity claim for three years' rent, etc., for injury resulting from the rejection of said lease by the Trustee in Bankruptcy, or for damages or indemnity under the covenant or covenants contained in said lease, is not presently provable in the above-entitled reorganization proceedings, then and in such event the court should in the order determining that said statutory parity claim is not presently provable provide that said statutory parity claim of
227 the claimants should constitute a legal or equitable charge upon the assets of the Debtor payable by the Debtor and/or any corporation to which the assets of the Debtor may be transferred at such times as the damages suffered by the claimants from said rejection or the breach of said covenants shall become liquidated in accordance with the applicable state law.

Claimants further pray that if the court should determine that the total amount of damages suffered by the claimants for the entire term of said lease from said rejection or the breach of said covenants over the amount of said statutory
228 parity claim is not presently provable in the above-entitled reorganization proceedings, then and in such event, whether or not said statutory parity claim shall be held provable at this time, the court should provide in the order so determining that said excess claim should constitute a legal or equitable charge upon the assets of the Debtor in subordination to debts which would be provable under Section 63 (a) of the Bankruptcy Act and to any statutory parity claims which may also constitute a charge against said assets, but in priority to the claims or interests of all holders of preferred and common stock of the Debtor.

Notice of Making and Entry of Report of Special Master.

229

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

230

Sirs:

PLEASE TAKE NOTICE that the within is a true copy of a report made and entered herein by Hon. Irwin Kurtz, Special Master, on Oct. 23, 1935.

Dated, New York, N. Y., October 25th, 1935.

Yours, etc.,

CRAVATH, DE GERSDORFF,
SWAINE & WOOD,
Attorneys and Solicitors for Irving Trust Company, Trustee of the estate of United Cigar Stores Company of America, Debtor,
Office and Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

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To:

HARVEY T. SATTERTHWAITE, ESQ.,
Attorney for Caroline B. Kuehner and Frederick G. Fischer, etc.,
137 E. State Street,
Trenton, New Jersey.

Notice of Making and Entry of Report of Special Master.

ROSENBERG, GOLDMARK & COLIN,
165 Broadway,
New York, N. Y.
Attorneys for Debtor.

M. CARL LEVINE,
535 Fifth Avenue,
New York, N. Y.
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.

and

RALPH MONTGOMERY ARKUSH,
15 Broad Street,
New York, N. Y.
Attorneys for Landlords' Protective Committee.

SHEARMAN & STERLING,
55 Wall Street,
New York, N. Y.

and

BERLE & BERLE,
70 Pine Street,
New York, N. Y.
Attorneys for Preferred Stockholders' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
15 Broad Street,
New York, N. Y.
Attorneys for Debentureholders Protective Committee.

SULLIVAN & CROMWELL,
48 Wall Street,
New York, N. Y.
Attorneys for United Stores Corporation.

Report of Special Master.

UNITED STATES DISTRICT COURT, 235

SOUTHERN DISTRICT OF NEW YORK.

No. 59,886.

In proceedings for reorganization of a corporation.

Claim No. 5184.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor. 236

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, Special Master herein, do hereby respectfully report, as follows:

This is an application to expunge the claim of Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, Landlords, for damages based 237 upon a covenant of indemnity contained in the lease herein. The Bondholders Protective Committee and the Preferred Stockholders Committee, Intervenors, contend that the Landlords are not entitled to any allowance at this time, but that pursuant to the terms of the covenant of indemnity, that the damages, if any, must only be allowed after March 31, 1946, the expiration date of the lease herein. The Claimants and counsel for the Jacob Ruppert Realty Corporation—Landlord Intervenor—contend that the

238 Landlords herein are entitled to an immediate allowance for all damages sustained for the balance of the term.

The situation presented herein is as follows: Heretofore and on the 18th day of October, 1926, the Landlords and the United Cigar Stores Company of America (United) entered into a lease for the premises herein situate in the City of Trenton, New Jersey, for a term commencing November 1st, 1926 and expiring on March 31st, 1946, at the yearly rental of Ten thousand ($10,000) Dollars the first ten years, and Eleven
239 thousand ($11,000) Dollars for the balance of the term. Paragraph 10th thereof, among other things, provided that in the event of the Tenant's default, insolvency, or bankruptcy, that the Landlords could enter into possession of the premises without prejudice to any remedies for arrears of rent or preceding breach of the covenant, and that

> "upon entry, as aforesaid, this lease shall determine and the tenant covenants that in case of such termination, it will indemnify the landlords against loss of rent which the
> 240 landlords may incur by reason of said termination, during the residue of the term above specified".

Pursuant to the terms of the lease, the United entered into possession of the premises and continued to occupy same. On August 29th, 1932 it filed its voluntary petition and was adjudicated a Bankrupt, on that day, and the Irving Trust Company was appointed Receiver. On September 10, 1932 the Irving Trust Company was elected Trustee. Thereafter and on November

14, 1932 the Irving Trust Company as Trustee 241
in Bankruptcy formally rejected the lease herein and surrendered to the Landlords possession of the premises. The Landlords thereupon re-entered upon the premises and thereafter let portions thereof for various terms. Based upon the foregoing, and irrespective as to the terms of the covenant of indemnity herein, the Landlords in view of the law as to claims for future rent in bankruptcy had no provable claim in the prior United bankruptcy proceeding.

However, on June 7th, 1934 Congress enacted 242
Section 77B of the Bankruptcy Act. Thereupon on June 9th, 1934 the United filed its petition for reorganization, which was duly approved, and the Irving Trust Company was appointed as Trustee in Reorganization. Based upon Section 77B, subd. (b) which provides in part, as follows:

> "In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this Section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, 243
> in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, for its acceptance and confirmation, be deemed to be a creditor. The claim of a Landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease, shall be treated as a claim ranking on a parity with debts which would be provable

244 under section 63 (a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the above surrender of the premises to the landlord or the date of reentry of the landlord, which ever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry:"

the Landlords filed the instant claim for damages
245 for $90,212.90 for breach of its covenant of indemnity caused by the rejection of the lease by the Trustee as aforesaid. The Landlords claimed $45,049.95 as their damages for the three years in accordance with the specific provisions of said Section 77B, subd. (b). As to the damage in excess thereof, the Landlords claimed that the amount thereof should be allowed in subordination to debts provable in bankruptcy, but in priority to the interests of the stockholders of the United.

Upon the hearing, the Trustee conceded that the Landlords were entitled to damages to the extent of the amount of rent reserved for three years,
246 but it objected to any allowance in excess thereof upon the ground that there was no provision in Section 77B therefor. The Bondholders Committee and the Preferred Stockholders Committee, as Intervenors, however, objected to the allowance of the Landlords' claims in any amount upon the ground that it could not now be determined whether the Claimants would suffer any loss as the result of the breach of the covenant of indemnity, and urged that this question could only be determined at the expiration of the term pursuant to the rule enunciated in *Hermitage v. Levine*, 248 N. Y. 233.

The Stockholders Protective Committee joined 247
in the objection made by the Trustee, namely, that as a matter of law the Landlords did not have any claim under Section 77B in excess of the three year period provided for. Thereupon, proof was adduced as to the reasonable rental value of the premises for the entire balance of the term, and the legal question herein was presented for determination.

The objecting Intervenors argue that at common law, upon the covenant herein, the Landlords could not bring an action until the expiration of the term, relying upon the rule in *Hermitage* v. 248
Levine (248 N. Y. 233) (*supra*). This proposition of law is not disputed. It is equally true as stated heretofore that the Landlords had no provable claim for damages in bankruptcy. The Landlords, however, point out that we are not now concerned with proceedings at common law or with provable claims in the ordinary bankruptcy proceedings;—that we are presently confronted with rights asserted by the Landlords under Section 77B. They contend that the question before the Court is the interpretation of the rights granted to Landlords under a 77B proceeding. They argue that when the purpose of the 249
enactment of Section 77B is considered, when an examination of the provisions thereof is made, and the intent of Congress ascertained, that it will become apparent that the Landlords' claim herein not only for the three years but in excess thereof, should be allowed in all respects.

There is no need of dwelling upon the purposes of the enactment of Section 77B. They are well-known and have repeatedly been set forth by the Courts. The entire aim of Section 77B was to attain results absolutely opposite to that usually

obtained in a bankruptcy proceeding. Suffice it to say that with its broad scope of conservation of business, and to furnish the assistance required by the inroads made by the depression, necessary provision had to be made that a reorganization should include every possible claim existing against the Debtor—whether it was absolute, conditional, contingent, or otherwise. There could not be any distinction between provable or non-provable claims, as existed in the ordinary bankruptcy liquidation proceeding. Accordingly, Congress took the pains to state (Sec. 77B, subd. (b)) that

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interest of whatever character."

Obviously, a Landlord whose lease had been rejected by a Trustee and the premises returned, had a claim under Section 77B, for damages where the lease contained a covenant of indemnity.

That such a Landlord could not maintain an action at common law upon its indemnity covenant until the expiration of the term made no difference to the aims and purposes of Section 77B, and the results that were sought to be obtained therefrom. The fact remained that such

a Landlord had a claim under this Section, and 253
that it necessarily would have to be included in
and disposed of in a reorganization proceeding.

It must be borne in mind that we are not presently dealing with actions at common law where the only parties involved are the Landlord and the Tenant. We are now administering a Statutory system with a definite goal. As the Supreme Court said in *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597—"When a statutory system is administered, the only question for the Courts is what the statutes prescribe".

Thus, if we merely considered the purposes of 254
Section 77B, with its all inclusive definition of "claims" and "creditors", the Landlord's claim herein would have to be allowed to the extent of the damages that could be legally provable. However, Section 77B gives further proof that Congress intended to make a claim of this nature provable herein. In addition to the endeavor to accomplish the beneficent purposes of reorganization, Congress was confronted with the problem caused by the non-provability of Landlord claims for future rent, particularly after the decision of the United States Supreme Court in the *Manhattan Properties-Irving Trust Company*, 291 U. 255
S. 320.

Congress realized the situation produced by the bankruptcies of many chain stores, followed thereafter by the rejection of leases by the Trustee in Bankruptcy, resulting in the losses sustained by Landlords. Congress was aware of the distinctions attempted to be drawn in the usual bankruptcy proceedings, based upon the language of the leases—whether contained in covenants of indemnity or otherwise, such as ipso facto provisions, for penalties, for presently measuring

256 damages, or for indemnity provisions accruing at the end of the term, for options to re-enter by the Landlords and other similar conditions. It was to obviate the very results of the Landlord situation in bankruptcy proceedings, that Congress made additional and specific provision in Section 77B for Landlords, where there was an unexpired lease and the same had been rejected either by a Trustee in Bankruptcy or by direction of the Court.

Congress by the enactment of Section 77B, subdivision (b) did not merely say that upon re-
257 jection of an unexpired lease that a Landlord should have a claim for damages. Congress in order to avoid any misunderstanding as to the scope of its enactments, specifically enumerated, and made such a Landlord's claim all embracing and inclusive and specifically provided not only for all injury resulting from such rejections but also "for damages or for indemnity under a covenant or covenants contained in the lease". No limitation was placed upon such a Landlord's claim. Obviously, the intent was to grant a landlord a right to an immediate allowance in a reorganization proceeding, where there had been
258 a rejection of his unexpired lease, irrespective as to whether his rights were based upon a covenant of damages or a covenant of indemnity with a clause for immediate assessment of damages or at the expiration of the term, and irrespective whether an action could be maintained immediately at common law upon any such covenant of indemnity.

It was also Congress' intent to free a Debtor of all future liability on executory contract of indemnity by proceedings in reorganization where there had been a rejection of the lease, as afore-

said, either by a Trustee or pursuant to an order 259
of the Court. The purpose was to effect a present, immediate disposition and adjustment of all claims actual or contingent, and to fix the present value of the contract or the amount of the damage suffered as a result of such rejection of the unexpired lease by the Trustee in Bankruptcy or by order of the Court, so as to efficiently and expeditiously aid and carry through the purposes of reorganization.

Undoubtedly Congress could under its broad bankruptcy powers set up this system of reorganization, could make provision that all claims should 260
be included and bound by such a proceeding, could furnish additional remedies—whether by anticipatory breach or otherwise—to a Landlord with an indemnity clause as in the instant case, where the Trustee in Bankruptcy had rejected the lease, and to make provision in the Statute as to the method and manner of proving a Landlord's damages in a reorganization proceeding. Obviously, Congress had the right to create such a remedy, as part of its plan of reorganization and the distribution of a Debtor's assets.

A claim based upon the indemnity covenant 261
herein can be evaluated in a Section 77B proceeding. It is reasonably susceptible of immediate valuation. Loss of rents over a period of time in the future can be presently ascertained, and this is determined by the difference between the rent reserved and the rental value for the balance of the term. The United States Supreme Court in *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597, stated this method to be "upon a footing that was familiar and fair".

In view of all the foregoing the Landlord's claim herein should be allowed as provided in

262 Section 77B to the extent of three years' rent on an equal parity with other provable claims. Such an allowance will carry out the laudable purposes sought to be accomplished by the Reorganization Act. This is eminently just and proper, and is in accordance with the express provisions of Section 77B (subd. (b)), as specifically pointed out heretofore.

Whether the Landlords are entitled to an allowance in excess of the three years' period, in subordination to the provable claims, but in priority to stockholders, is not required to be determined at this time. Whether there will be a
263 surplus over and above the amount of provable claims and expenses of administration, how the same is to be distributed and, in fact, the method of payment and manner thereof to the various creditors, will depend upon the classification of creditors and the respective rights of the various interested parties herein. All these matters will only be presented when the time for classification arrives, and when various questions arise in the consideration and the confirmation of any Plan of Reorganization. Accordingly I will adopt the suggestion of the Trustee and the opposing Inter-
264 venors, and will leave the question as to the allowance of any excess claim for future consideration, as aforesaid.

After the hearings had been concluded, and briefs submitted, my attention was called to the Report of Hon. Thomas D. Thatcher, acting as Special Master, in the Matter of Radio Keith Orpheum Corp., Debtor. Permission was afforded to the parties to serve additional briefs based upon their contentions in respect thereto. I have carefully examined this Report and I find that it

does not affect the legal question presented herein. 265
It appears therefrom as follows:

(a) *In re claim of Rockefeller Center, Inc.*—the Special Master recognized Section 77B did not limit merely to a three year period basis a liquidated damage claim which would have been provable in a bankruptcy proceeding for a period beyond three years, and that the purpose of this section was to provide for landlords' claims which heretofore were not provable in a bankruptcy proceeding. He also applied the general rule that damages cannot be awarded upon a 266
claim which is so indefinite, so uncertain and so speculative as to be incapable of proof, when it appeared that certain office space was surrendered, and the tenant in November 1932, agreed that at the Landlord's option to lease five years later, namely, December 1937, such part thereof as would not be then leased by the Landlord—it thus appearing that neither the obligation nor the damage for the breach of this supplemental agreement could be foretold.

(b) *In re claims of Hoblitzlle*, the Special 267
Master stated the well-established rule that the debtor's liability as a guarantor of various leases based upon covenants as to the reletting of the premises and holding the tenant for a deficiency is non-existent until a deficiency is ascertained; and that accordingly a claim upon such guaranty with respect to future rents is so far contingent as not to be susceptible of proof. (It should be noted herein that these claims were all founded upon a guaranty; and that they were not based upon any of the provisions

268 of §77B, as there had been no rejections of the leases by a Trustee in Bankruptcy or by an order of the Court.)

(c) In the claim of Broadway & 47th Street Corp., Landlord, the Special Master specifically pointed out that it was clearly distinguishable from the instant case. Both the covenant of indemnity contained therein as well as in the Landlords' lease herein, made no provision for the immediate assessment of damages, measured by the difference between the rental value and the
269 rent reserved for the balance of the term. Accordingly, neither landlord pursuant to the rule of *Hermitage* v. *Levine, supra,* could have maintained an action at common law until the expiration of the term; and of course, neither landlord had a provable claim in bankruptcy. However, at this point the similarity between the two situations ceases. Broadway & 47th Street Corp., landlord, had no claim in a §77B proceeding for the very good reason that there was no rejection of an unexpired lease by the Trustee in Bankruptcy or by an order of the Court, and ac-
270 cordingly its claim was not based on the specific provisions of Section 77B, subd. (b). The Special Master points to this fact on page 41 of his Report, as follows:

> "It is further contended in behalf of the claimant that subdivision (b) of Section 77-B, the Corporate Reorganization section of the Bankruptcy Act, authorizes the allowance of its claim for the difference between the rent reserved and the rental value of the premises, limited to an amount not to exceed the rent without ac-

celeration reserved by the lease for the 271
three years next succeeding the date of surrender. In this case there was no rejection of the lease by any trustee or receiver in bankruptcy or in equity, or pursuant to any direction of a judge in this proceeding. The premises were surrendered by the assignee of the debtor corporation pursuant to the notice given by the landlord under the Twenty-first article of the lease." * * * (Underscoring mine.)

However, in the instant case the Irving Trust Company as Trustee in Bankruptcy herein, did 272
on November 14th, 1932 reject the lease and did surrender to the Landlords possession of the premises which was followed by the Landlords' re-entry upon the premises. Accordingly, the Landlords herein base their claim solely on the rights conferred on them by the specific provisions of Section 77B, subd. (b).

(d) In the Fort Worth Properties claim, the Special Master based his decision upon the termination of the lease by the Landlord prior to any rejection by the Trustee and therefore not upon any claim asserted under 273
Section 77B, subd. (b), as aforesaid.

The Special Master in his Report suggests that contingent claims "incapable of proof"—such as was presented in the surrendered office space in the Rockefeller Centre claim—should be left to the Court for equitable treatment in any Plan of Reorganization. However, as to contingent claims that "are capable of proof"—(other than the instant case, based specifically upon the indemnity clause of Section 77B subd. (b) *supra*)—he recommends that the ascertainable damages to the last day of the filing of claims should

only be allowed, and the balance of the claim should be left to the Court for equitable treatment in any Plan of Reorganization.

However, such a rule may not be of general application. My experience has shown that there is no hard and fast rule as to the time limit within which proofs of claim must be filed in a reorganization proceeding. An examination of the records in the Clerk's office in this District will indicate that claims have been required to be filed as early as within thirty days after the approval of the petition in reorganization. In fact, I have had a proceeding in which claims were not required to be filed until after the confirmation of the Plan, and the claims were to be allowed upon the basis of the records of the Debtor and with adjustments to be made thereafter.

Thus, it may not be practicable or feasible to split up such claims in two periods—(1) up to the date of the filing of the claims which may be very close to the date of the approval of the petition of reorganization, and (2) at the time of the consideration of the Plan of Reorganization. It seems to me that where there is a legal method of ascertaining damages such as taking the difference between the rent reserved and the reasonable rental value, that damages should be assessed at one time upon the hearing held upon the objection to the claim, disposed of then, and the amount of the Debtor's obligations immediately ascertained. This would indeed accomplish the very purposes and come within the scope contemplated by Section 77B. Such a rule would be workable, feasible, and of general application.

However, as pointed out heretofore, the Special Master's Report in the Radio Keith Orpheum Corp. is not applicable to the situation herein

presented. The decisions on the claims in his Report have no bearing either upon the facts or upon the questions of law involved in this case. Accordingly, the recommendations in said Report as to the treatment of unprovable contingent claims, and as to the splitting up of the damages of contingent claims, which are capable of proof (and which are not founded specifically upon the indemnity clause of §77B, subd. (b) caused by a rejection of the lease by a Trustee or by order of the Court, as aforesaid), likewise have no relevancy or bearing upon the legal question presented herein. 277

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From the evidence adduced upon the hearing had herein, it is conceded by the Irving Trust Company, as Trustee, that the total damage which the Landlords herein would suffer as the result of the aforesaid rejection over the term of their lease which expires on March 31st, 1946, will not be less than the three year period specifically set forth in Section 77B, sub. (b) and allowable on an equal parity with other provable claims in bankruptcy. This amounts to $44,377.55.

Accordingly, I recommend that the Landlords should be allowed the said sum of $44,377.55 as a general claim, and that all questions as to the excess of their claim—namely, beyond the statutory three year period—should be reserved until the time of the classification of creditors and stockholders according to the nature of their respective claims and interests, and the consideration of a plan of reorganization, as aforesaid. 279

Respectfully submitted,

IRWIN KURTZ,
Special Master.

Dated, New York, October 23, 1935.

Exceptions of Claimants to Report of Special Master.

280

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter

of

281

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

EXCEPTIONS OF CAROLINE R. KUEHNER AND FREDERICK G. FISCHER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ADAM FISCHER, DECEASED, TO REPORT OF HON. IRWIN KURTZ, SPECIAL MASTER, DATED OCTOBER 23, 1935, RELATING TO CLAIM NO. 5184.

282 Now come Caroline R. Kuehner and Frederick G. Fischer, as trustees under the last will and testament of Adam Fischer, deceased (hereinafter called the "Claimants"), and respectfully except to the report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935, as follows:

1. To so much of said report as determines that the question whether the claim of the Claimants is entitled to be allowed in an amount in excess of the amount of the rent for three years in subordination to provable claims but in priority to the interests of all stockholders is not

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now presented and will only be presented "when the time for classification arrives, and when various questions arise in the consideration and the confirmation of any Plan of Reorganization".

2. To so much of said report as determines that the question whether there will be a surplus in excess of the amount of provable claims and expenses of administration depends, or will depend, on "the classification of creditors and the respective rights of various interested parties herein", and to so much of said report as impliedly determines that the question of the validity of the claim of the Claimants in excess of the amount of the rent for three years need not be determined until it is determined whether there is a surplus of assets in excess of the amount of provable claims and expenses of administration.

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3. To so much of said report as asserts that the Trustee and opposing intervenors suggested to the Special Master that the question as to the allowance of the claim of the Claimants in excess of the amount of the rent for three years should be reserved for future consideration.

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4. To so much of said report as determines that the question whether the claim of the Claimants should be allowed in excess of the amount of the rent for three years in subordination to provable claims but in priority to the interests of all stockholders, is not required to be determined at this time.

5. To so much of said report as determines that the question "as to the excess of their [the Claimants'] claim—namely, beyond the statutory

286 three-year period—should be reserved until the time of the classification of creditors and stockholders according to the nature of their respective claims and interests, and the consideration of a plan of reorganization".

6. To said report in so far as it fails to determine that the amount of the claim of the Claimants in excess of the sum of $44,377.55, the amount of the statutory three-year claim, is provable and allowable in subordination to other provable claims but in priority to the interests of all stock-
287 holders.

7. To said report in so far as it fails to determine the amount of the claim of the Claimants in excess of the sum of $44,377.55, the amount of the statutory three-year claim.

8. To said report in so far as it fails to determine that if the amount of the claim of the Claimants in excess of the sum of $44,377.55, the amount of the statutory three-year claim, is not provable and allowable, it remains a charge upon the assets of the Debtor or any corporation to which the assets of the Debtor may be transferred, in pri-
288 ority to the interests of all stockholders.

9. To said report in so far as it fails to determine that, if the amount of the claim of the Claimants in excess of the sum of $44,377.55, the amount of the statutory three-year claim, is not provable and allowable, the statute does not extinguish or destroy said excess portion of the claim.

10. To said report in so far as it fails to determine that, if the statute, properly construed, provides that if said excess claim of the Claimants

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is not provable and allowable and does not remain a charge upon the assets of the Debtor in priority to the interests of all stockholders, the provision or provisions of Section 77B so providing and extinguishing the claim are unconstitutional as beyond the power conferred upon the Congress by the bankruptcy clause of the Constitution (Article I, Section 8, Clause 4), and as violative of the Fifth Amendment of the Constitution in that it deprives the Claimants of property without due process of law and takes their property for public use without just compensation.

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11. To said report in so far as it fails to determine that, after eliminating such unconstitutional parts of the statute, the claim of the Claimants is, under the statute, provable and entitled to participate in any plan of reorganization herein in full on a parity with all other provable claims.

12. To said report in so far as it fails to determine that the claim of the Claimants herein is provable and allowable and entitled to participate in any plan of reorganization herein in full on a parity with all other provable claims.

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Dated, November 4, 1935.

Respectfully submitted,

CAROLINE R. KUEHNER and
FREDERICK G. FISCHER,
as trustees as aforesaid,

By MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys and Solicitors for the
Claimants,
Office and Post Office Address,
20 Exchange Place,
New York, N. Y.

Exceptions of Preferred Stockholders' Protective Committee to Report of Special Master.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

EXCEPTIONS OF PREFERRED STOCKHOLDERS' PROTECTIVE COMMITTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, INTERVENORS HEREIN, TO REPORT OF HONORABLE IRWIN KURTZ, SPECIAL MASTER, DATED OCTOBER 23, 1935, IN RESPECT TO CLAIM OF FREDERICK G. FISCHER AND CAROLINE R. KUEHNER, AS TRUSTEES, ETC. CLAIM NO. 5184 AND TO THE RULINGS OF THE SAID SPECIAL MASTER AT THE HEARING THEREON.

To the Honorable Judges of the United States District Court, for the Southern District of New York:

Now, come Grayson M.-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Protective Stockholders' Protective Committee of United Cigar Stores Company of America, Intervenors herein, and respectfully except to the

Exceptions of Preferred Stockholders' Protective Committee to Report of Special Master.

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Report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935, recommending that the claim of Frederick G. Fischer and Caroline R. Kuehner, as executors and trustees under the will of Adam Fischer (Claim No. 5184) be allowed as a general claim herein in the amount of $44,377.55, and to the rulings of the said Special Master at the hearing thereon, as follows:

1. To so much of such report as refers

(a) To the purposes of the enactment of Section 77B of the Bankruptcy Act,

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(b) To the alleged circumstance that a reorganization under Section 77B should include every possible claim existing against the Debtor, whether such claim be absolute, conditional, contingent or otherwise,

(c) To the alleged circumstance that there can be no distinction under Section 77B between provable and non-provable claims, as existed in the ordinary bankruptcy liquidation proceeding,

as having any bearing on the legal questions presented by the claim herein or the objections made thereto.

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2. To so much of said report as decides that a landlord whose lease has been rejected by a Trustee and the premises returned has a claim under Section 77B for damages where the lease contains a covenant of indemnity.

3. To so much of said report as decides that the fact that such a landlord as the present claimants could not maintain an action at common law

298 upon the indemnity covenant contained in the lease until the expiration of the term makes no difference to the aims and purposes of Section 77B and the results that were sought to be obtained therefrom, and that such a landlord has a claim under Section 77B which would necessarily have to be included in and disposed of in a reorganization proceeding.

4. To so much of said report as determines that a consideration of the purposes of Section 77B and any of the language of Section 77B re-
299 quires that the landlords' claim herein be allowed to the extent of the damages that could be legally provable.

5. To so much of said report as determines that the intent of Congress in the enactment of Section 77B was to grant a landlord a right to an immediate allowance in a reorganization proceeding, where there had been a rejection of his unexpired lease, irrespective as to whether his rights were based upon a covenant of damages or a covenant of indemnity with a clause for immediate assess-
300 ment of damages or at the expiration of the term, and irrespective as to whether an action could be maintained immediately at common law upon any such covenant of indemnity.

6. To so much of said report as refers

(a) To the alleged intent of Congress to free a debtor of all future liability on executory contracts of indemnity by proceedings in reorganization where there has been a rejection of the lease either by a Trustee or pursuant to an order of the Court,

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(b) To the alleged purpose of Congress to effect a present immediate disposition and adjustment of all claims, actual or contingent, and to fix the present value of the contract or the amount of the damage suffered as a result of such rejection of the unexpired lease by the Trustee in Bankruptcy or by order of the Court, so as to efficiently and expeditiously aid and carry through the purposes of reorganization,

as having any bearing on the legal questions presented by the claim herein or the objections made 302
thereto.

7. To so much of said report as determines that a claim based upon the covenant of indemnity contained in the lease upon which the claim herein is based can be evaluated in a Section 77B proceeding and is reasonably susceptible of immediate valuation, and that loss of rents over a period of time in the future can be presently ascertained by the difference between the rent reserved and the rental value for the balance of the term, or in any other manner. 303

8. To so much of said report as determines that the landlords' claim herein should be allowed to the extent of three years' rent on an equal parity with other provable claims, and that such an allowance will carry out the purposes sought to be accomplished by Section 77B, is just and proper, and is in accordance with the express provisions of Section 77B, subdivision (b).

9. To so much of such report as fails to determine that the amount of the claim, if provable or

304 allowable, should be limited to an amount not to exceed the rent, without acceleration, reserved by the lease for the three years next succeeding the date of surrender of the premises to the claimants or the date of reentry of the claimants, whichever first occurred, plus unpaid rent accrued up to such date of surrender or reentry.

10. To so much of such report as decides that it is not required at the present time to determine whether landlords are entitled to an allowance in excess of the three years' period in subordination
305 to the provable claims, but in priority to stockholders and as decides that the method of distribution of the surplus over and above the amount of provable claims and expenses of administration, the method of payment and manner thereof will depend upon the classification of creditors and the respective rights of the various interested parties and as decides that such matters shall only be presented when the time for classification arises and when the various questions arise in the consideration and confirmation of any Plan of Reorganization.

306 11. To so much of said report as determines that the Report of the Hon. Thomas D. Thacher, acting as Special Master in the matter of Radio Keith-Orpheum Corporation, Debtor, does not affect or is not applicable to the legal questions presented by the claim herein and the objections made thereto, and to so much of such report as attempts to distinguish said Report of said Hon. Thomas D. Thacher as such Special Master, or any portion thereof, on any grounds mentioned in the report of the Hon. Irwin Kurtz, dated October 23, 1935, or otherwise.

Exceptions of Preferred Stockholders' Protective Committee to Report of Special Master.

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12. To so much of such report as refers to the time limit within which proofs of claim must be filed in a reorganization proceeding as having any bearing on the legal questions presented by the claim herein and the objections made thereto.

13. To so much of said report as recommends that damages measured by the difference between the rent reserved and the reasonable rental value should be assessed upon the hearing held upon the objection to the claim, disposed of then, and the amount of the Debtor's obligations immediately determined, and that such a rule would accomplish the purposes and come within the scope contemplated by Section 77B and would be workable, feasible, and of general application.

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14. To so much of such report as recommends that the landlords herein should be allowed the sum of $44,377.55 as a general claim herein.

15. To such report in whole and in each and every part thereof for the determination therein that an order should be made herein directing the allowance of said claim in said sum of $44,377.55, or in any other amount, as a general claim against the estate of the Debtor herein.

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16. To such report in whole and in each and every part thereof for failure to determine that an order should be entered herein disallowing said claim in whole as a general claim against the estate of the Debtor herein and barring said claim from participation in any plan of reorganization proposed or confirmed herein on a parity with other claims allowed or allowable as general claims herein.

Exceptions of Preferred Stockholders' Protective Committee to Report of Special Master.

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17. To the ruling of the Special Master at the hearing on the claim in admitting evidence as to the rental value of the demised premises on or about August 29, 1932.

18. To the ruling of the Special Master at the hearing on the claim in admitting the evidence as to the rental value of the demised premises on or about November 14, 1932.

The foregoing exceptions are submitted as both general and specific exceptions and are intended to apply to such report and all findings and determinations therein and all rulings at the hearing on the claim which are inconsistent with such exceptions.

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Dated November 4, 1935.

Respectfully submitted,

SHEARMAN & STERLING,

and

BERLE & BERLE,

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Attorneys for Preferred Stockholders' Protective Committee.

Exceptions of Debentureholders' Protective Committee to Report of Special Master. 313

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA, 314
Debtor.

EXCEPTIONS OF DEBENTUREHOLDERS' PROTECTIVE COMMITTEE TO REPORT OF HONORABLE IRWIN KURTZ DATED OCTOBER 23, 1935, IN RESPECT TO CLAIM OF FREDERICK G. FISCHER AND CAROLINE R. KUEHNER, AS TRUSTEES, ETC. CLAIM NO. 5184.

To the Honorable Judges of the United States District Court for the Southern District of New York: 315

Now, come Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, by their attorneys, Davis, Polk, Wardwell, Gardiner & Reed, and respectfully except to the Report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935, recommending that the claim of Frederick G. Fischer and Caroline R. Kuehner, as executors and trustees under the will of Adam Fischer (Claim No. 5184) be al-

Exceptions of Debentureholders' Protective Committee to Report of Special Master.

316 lowed as a general claim herein in the amount of $14,377.55, as follows:

1. To so much of such report as refers

(a) To the purposes of the enactment of Section 77B of the Bankruptcy Act,

(b) To the alleged circumstance that a reorganization under Section 77B should include every possible claim existing against the Debtor, whether such claim be absolute, conditional, contingent or otherwise,

317 (c) To the alleged circumstance that there can be no distinction under Section 77B between provable and non-provable claims, as existed in the ordinary bankruptcy liquidation proceeding,

as having any bearing on the legal questions presented by the claim herein or the objections made thereto.

2. To so much of said report as decides that a landlord whose lease has been rejected by a Trustee and the premises returned has a claim under 318 Section 77B for damages where the lease contains a covenant of indemnity.

3. To so much of said report as decides that the fact that such a landlord as the present claimants could not maintain an action at common law upon the indemnity covenant contained in the lease until the expiration of the term makes no difference to the aims and purposes of Section 77B and the results that were sought to be obtained therefrom, and that such a landlord has a claim under Section 77B which would necessarily have

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to be included in and disposed of in a reorganization proceeding.

4. To so much of said report as determines that a consideration of the purposes of Section 77B and any of the language of Section 77B requires that the landlords' claim herein be allowed to the extent of the damages that could be legally provable.

5. To so much of said report as determines that the intent of Congress in the enactment of Section 77B was to grant a landlord a right to an 320
immediate allowance in a reorganization proceeding, where there had been a rejection of his unexpired lease, irrespective as to whether his rights were based upon a covenant of damages or a covenant of indemnity with a clause for immediate assessment of damages or at the expiration of the term, and irrespective of whether an action could be maintained immediately at common law upon any such covenant of indemnity.

6. To so much of said report as refers

(a) To the alleged intent of Congress to 321
free a debtor of all future liability on executory contracts of indemnity by proceedings in reorganization where there has been a rejection of the lease either by a Trustee or pursuant to an order of the Court.

(b) To the alleged purpose of Congress to effect a present immediate disposition and adjustment of all claims, actual or contingent, and to fix the present value of the contract or the amount of the damage suffered as a result of such rejection of the unexpired lease

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by the Trustee in bankruptcy or by order of the Court, so as to efficiently and expeditiously aid and carry through the purposes of reorganization,

as having any bearing on the legal questions presented by the claim herein or the objections made thereto.

7. To so much of said report as determines that a claim based upon the covenant of indemnity contained in the lease upon which the claim here-
323 in is based can be evaluated in a Section 77B proceeding and is reasonably susceptible of immediate valuation, and that loss of rents over a period of time in the future can be presently ascertained by the difference between the rent reserved and the rental value for the balance of the term, or in any other manner.

8. To so much of said report as determines that the landlords' claim herein should be allowed to the extent of three years' rent on an equal parity with other provable claims, and that such an al-
324 lowance will carry out the purposes sought to be accomplished by Section 77B, is just and proper, and is in accordance with the express provisions of Section 77B, subdivision (b).

9. To so much of said report as determines that the Report of the Hon. Thomas D. Thacher, acting as Special Master in the Matter of Radio Keith-Orpheum Corporation, Debtor, does not affect or is not applicable to the legal questions presented by the claim herein and the objections made thereto, and to so much of such report as

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attempts to distinguish said Report of said Hon. Thomas D. Thacher as such Special Master, or any portion thereof, on any grounds mentioned in the report of the Hon. Irwin Kurtz, dated October 23, 1935, or otherwise.

10. To so much of such report as refers to the time limit within which proofs of claim must be filed in a reorganization proceeding as having any bearing on the legal questions presented by the claim herein and the objections made thereto.

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11. To so much of said report as recommends that damages measured by the difference between the rent reserved and the reasonable rental value should be assessed upon the hearing held upon the objection to the claim, disposed of then, and the amount of the Debtor's obligations immediately determined, and that such a rule would accomplish the purposes and come within the scope contemplated by Section 77B and would be workable, feasible, and of general application.

12. To so much of such report as recommends that the landlords herein should be allowed the sum of $44,377.55 as a general claim herein. 327

13. To such report in whole and in each and every part thereof for the determination therein that an order should be made herein directing the allowance of said claim in said sum of $44,377.55, or in any other amount, as a general claim against the estate of the Debtor herein.

14. To such report in whole and in each and every part thereof for failure to determine that an order should be entered herein disallowing said

328 claim in whole as a general claim against the estate of the Debtor herein and barring said claim from participation in any plan of reorganization proposed or confirmed herein on a parity with other claims allowed or allowable as general claims herein.

The foregoing exceptions are submitted as both general and specific exceptions and are intended to apply to such report and all findings and determinations therein which are inconsistent with such exceptions.

329 In making the foregoing exceptions the said Debentureholders' Protective Committee expressly reserves its rights to object to the constitutionality of that portion of Section 77B of the Bankruptcy Act which purports to establish the claim herein on a parity with claims which were originally provable against the bankrupt estate of the Debtor herein.

Dated, November 2, 1935.

Respectfully submitted,

330 DAVIS, POLK, WARDWELL,
GARDINER & REED,
Attorneys for Debentureholders'
Protective Committee.
Office and Post Office Address,
No. 15 Broad Street,
Borough of Manhattan,
New York, N. Y.

To:

ROSENBERG, GOLDMARK & COLIN,
165 Broadway,
New York, N. Y.
Attorneys for Debtor.

Exceptions of Debenturcholders' Protective Committee to Report of Special Master.

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M. CARL LEVINE,
535 Fifth Avenue,
New York, N. Y.
Attorney for Jacob Ruppert Realty Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,

and

RALPH MONTGOMERY ARKUSH,
15 Broad Street,
New York, N. Y.
Attorneys for Landlords' Protective Committee.

332

SHEARMAN & STERLING,
55 Wall Street,
New York, N. Y.,

and

BERLE & BERLE,
70 Pine Street,
New York, N. Y.
Attorneys for Preferred Stockholders' Protective Committee.

333

SULLIVAN & CROMWELL,
48 Wall Street,
New York, N. Y.
Attorneys for United Stores Corporation.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
15 Broad Street,
New York, N. Y.
Attorneys and Solicitors for Irving Trust Company, Trustee of the Estate of United Cigar Stores Company of America, Debtor.

Certificate of Special Master to District Court.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59,886.

In the Matter

of

335 UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

To the Honorable Judges of the United States District Court, Southern District of New York:

I, IRWIN KURTZ, Special Master herein, make the following report:

1. On October 23, 1935 I made a Report
336 recommending that the claim of Frederick G. Fischer and Caroline R. Kuehner, as executors and trustees under the will of Adam Fischer, Landlords, for damages based upon a covenant of indemnity contained in a lease herein, should be allowed in the sum of $44,377.55, as a general claim, and that all questions as to the excess of the Landlords' claim herein—namely beyond the statutory three year period—should be reserved until the time of the classification of creditors and stockholders according to the nature of their

respective claims and interests, and the consideration of a Plan of Reorganization. 337

2. On November 4th, 1935, the Landlord-Claimants herein and two of the intervenors, namely, the Bondholders Protective Committee and the Preferred Stockholders Committee, feeling aggrieved thereat filed exceptions.

3. The exceptions urged by the Bondholders Protective Committee and by the Preferred Stockholders Committee, briefly summarized, are that pursuant to the terms of the covenant of indemnity herein, that the Landlord-Claimants have 338 no presently allowable claim but their damages, if any, must be ascertained at the expiration of the lease, namely, March 31st, 1946; the Preferred Stockholders Committee also urge in their exceptions that in any event the said Landlord-Claimants have no claim in excess of the statutory three year period provided for by Section 77B. On the other hand, the Claimant-Landlords contend in their Exceptions that they are presently entitled to an allowance beyond the three year parity period, namely, damages for the entire period of the lease. 339

4. The respective contentions of the Trustees, the Claimant-Landlords and the Intervenors, as well as the legal questions involved herein, are fully set forth in the Special Master's Report dated October 23rd, 1935, to which this Court is respectfully referred.

5. I hand up herewith the following:

(a) Exceptions.

(b) Special Master's Report.

340 (c) Objections and application to expunge.

(d) Stenographic minutes and exhibits.

Dated, New York, November 6th, 1935.

.....

Special Master.

This Certificate will be placed on the Bankruptcy Motion Calendar in the District Court, on Wednesday November 13th, 1935 at 10:30 A. M.

341 Notice thereof by mail given to:

CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Trustee,
15 Broad Street,
N. Y. C.

ROSENBERG, GOLDMARK & COLIN,
Attorneys for Debtor,
165 Broadway,
N. Y. C.

342 M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation,
535 5th Avenue,
N. Y. C.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Claimants and Landlords Protective Committee,
20 Exchange Place,
N. Y. C.

RALPH MONTGOMERY ARKUSH, 343
Attorneys for Landlords Protective
Committee,
15 Broad Street,
N. Y. C.

SHEARMAN & STERLING,
Attorneys for Preferred Stockholders
Protective Committee,
55 Wall Street,
N. Y. C.

BERLE & BERLE, 344
Attorneys for Preferred Stockholders
Protective Committee,
70 Pine Street,
N. Y. C.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debenture Holders Protective
Committee,
15 Broad Street,
N. Y. C.

SULLIVAN & CROMWELL,
Attorneys for United Stores Corporation
and for Debtor in State Court Actions, 345
48 Wall Street,
N. Y. C.

Order Appealed From.

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At a Special Term for Bankruptcy Motions of the United States District Court in and for the Southern District of New York, at the Court House thereof, Foley Square, the Borough of Manhattan, City and Southern District of New York on the 4th day of February, 1936.

Present—HONORABLE JOHN C. KNOX,
United States District Judge.

347 In Proceedings for Reorganization of a Corporation—No. 59886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
a New Jersey corporation,

Debtor.

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348 On reading and filing the report, dated October 23, 1935, of Honorable Irwin Kurtz, Special Master, recommending that the claim filed herein by Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer (hereinafter called the claimants) be allowed in the principal amount of $44,377.53 as a general claim on an equal parity with other provable claims, and that all questions as to the excess amount claimed by such claimants in subordination to provable claims against the Debtor, but in priority to the interests of the holders of

the Preferred and the Common stock of the 349
Debtor, be reserved until the time of the classification of creditors and stockholders of the Debtor for the purposes of a plan of reorganization; and

Upon the exceptions to said report, dated November 2, 1935, and filed herein on behalf of the Debentureholders Protective Committee, the exceptions dated November 4, 1935, and filed herein on behalf of the Preferred Stockholders Protective Committee, and the exceptions dated November 5, 1935, and filed herein on behalf of the claimants; the certificate of the Special Master, dated November 6, 1935, certifying to this Court the questions 350
presented by such exceptions, and upon the other documents and papers referred to in said certificate, and after hearing M. Carl Levine, Esq., attorney for Jacob Ruppert Realty Corporation, in support of said report in its entirety, Messrs. Mitchell, Taylor, Capron & Marsh, attorneys for the claimants, by Henry L. Glenn of counsel, in support of said report, except in so far as it reserved the question of the status of the excess claim above referred to, and Messrs. Davis, Polk, Wardwell, Gardiner & Reed, attorneys for the Debentureholders Protective Committee, by Ralph M. Carson, Esq., and Messrs. Shearman & Sterling 351
and Messrs. Berle & Berle, attorneys for the Preferred Stockholders Protective Committee, by Winthrop H. Kellogg of counsel, both in opposition to said report, and after due consideration, it is, on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys for the Trustee of the Debtor's Estate,

ORDERED that the report of Honorable Irwin Kurtz, Special Master, dated October 23, 1935, with respect to the claim of Frederick G. Fischer and Caroline R. Kuehner, as Executors and

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Trustees under the Will of Adam Fischer, be, and the same is, approved and confirmed, with the exception that the extent of the claimants' right to participate in these proceedings shall be limited to the amount found by said report to be allowable, to-wit, $44,377.55.

JNO. C. KNOX,
U. S. D. J.

Filed 2/5/36.

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353 **Claimants' Petition for Appeal and Order Allowing Appeal.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation.

No. 59,886.

In the Matter

of

354 UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

To the Honorable the Judges of the District Court of the United States, Southern District of New York:

The petitioners, Caroline R. Kuehner and Frederick G. Fischer, as trustees under the last will and testament of Adam Fischer, feeling them-

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selves aggrieved, for the reasons set forth in the assignment of errors hereto annexed and filed herewith, by the order of this Court dated February 4, 1936, and entered herein on or about February 5, 1936, approving and confirming the report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935, in so far as said report recommended the allowance of the claim of said petitioners against United Cigar Stores Company of America, the Debtor herein, in the amount of $44,377.55, as a general claim on an equal parity with other provable claims, and otherwise dis- 356
approving said report and limiting the right of said petitioners to participate in the above-entitled proceedings to said amount of $44,377.55 and extinguishing the claim of said petitioners to the extent that the amount thereof exceeds the sum of $44,377.55, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of said order as extinguishes the portion of the claim filed by said petitioners herein in excess of the amount of $44,377.55 and limits the right of said petitioners to participate in the above-entitled proceedings to said amount, and pray that their appeal be al- 357
lowed and that a citation issue, as provided by law, directed to all of the parties to the above-entitled proceedings, commanding them to appear before said United States Circuit Court of Appeals to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record upon which said order dated February 4, 1936, was based and of all proceedings relating to said claim, duly authenticated, be transmitted to said United States Circuit Court of Appeals, and that a proper order re-

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lating to the security to be required of the appellants be made, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated, New York, N. Y., March 3, 1936.

CAROLINE R. KUEHNER and
FREDERICK G. FISCHER,
as trustees under the will of
Adam Fischer,

By MITCHELL, TAYLOR, CAPRON
& MARSH,

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Attorneys and Solicitors for
Caroline R. Kuehner and Frederick G. Fischer, as trustees
under the will of Adam
Fischer,

Office and Post Office Address,
20 Exchange Place,
New York, N. Y.

360

Claimants' Petition for Appeal and Order Allowing Appeal.

361

United States of America,
Southern District of New York,
County of New York—ss.:

HENRY L. GLENN, being duly sworn, deposes and says: That he is associated with the firm of Mitchell, Taylor, Capron & Marsh, attorneys and solicitors for Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, the petitioners named in the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

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HENRY L. GLENN.

Sworn to before me this
3rd day of March, 1936.

THOMAS I. FITZGERALD,
Notary Public,
New York County.
N. Y. Co. Clk's No. 107, Reg. No. 7F321.
Commission expires March 30, 1937.

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ORDERED that the foregoing petition is granted, appeal is allowed as prayed for and bond for costs is fixed in the sum of $250.

Dated, March 4th, 1936.

ALFRED C. COXE,
U. S. D. J.

Claimants' Assignment of Errors.

364

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In proceedings for reorganization of a corporation.

No. 59,886.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

365

Now come Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer (hereinafter called the "Claimants"), creditors of United Cigar Stores Company of America, the above-named Debtor, and file the following assignment of errors upon which they will rely upon prosecution of the appeal in the above-entitled proceedings from the order of the United States District Court for the Southern District of New York dated February 4, 1936,
366 and filed on or about February 5, 1936, and say that said order dated February 4, 1936, was and is erroneous in law and in fact:

1. In so far as it fails to determine that the amount of the claim of the Claimants in excess of the sum of $44,377.55, the amount of the statutory "three-year rent" claim, is provable and allowable herein in subordination to other provable claims but in priority to the interests of all stockholders of the Debtor.

2. In so far as it fails to determine the amount 367
of the claim of the Claimants in excess of said sum of $44,377.55.

3. In so far as it fails to determine that, if the amount of the claim of the Claimants in excess of said sum of $44,377.55 is not provable and allowable, it remains a charge upon the assets of the Debtor, or any corporation to which the assets of the Debtor may be transferred, in priority to the interests of all stockholders of the Debtor.

4. In so far as it determines that Section 77B 368
of the Bankruptcy Act extinguishes the portion of the claim filed by the Claimants in excess of said sum of $44,377.55, and limits their right to participate in the above-entitled proceedings to said amount, and in so far as it determines that said statute, so construed, is constitutional.

5. In so far as it fails to determine that the provision or provisions of Section 77B extinguishing the portion of the claim of the Claimants in excess of the sum of $44,377.55 and limiting their right to participate herein to said sum are unconstitutional in that they exceed the 369
power conferred upon the Congress by the Bankruptcy Clause of the Constitution of the United States (Article I, Section 8, Clause 4) and violate the Tenth Amendment of said Constitution, and in that they violate the Fifth Amendment of said Constitution by depriving the Claimants of property without due process of law and taking their property for public use without just compensation.

6. In so far as it fails to determine that, after eliminating the unconstitutional portion of the

370 statute, the claim of the Claimants is, under the statute, provable and allowable and entitled to participate in any plan of reorganization herein in full on a parity with all other provable claims.

7. In so far as it fails to determine that the claim of the Claimants herein is provable and allowable and entitled to participate in any plan of reorganization herein in full on a parity with all other provable claims.

WHEREFORE, the Claimants pray that said order, in so far as appealed from, be reversed, and that they have such other and further relief as
371 shall be just and proper.

Dated, March 3, 1936.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys and solicitors for
Caroline R. Kuehner and
Frederick G. Fischer, as
trustees under the will of
Adam Fischer,
Office and Post Office Address,
20 Exchange Place,
372 New York, N. Y.

Claimants' Citation.

By the Honorable Alfred C. Coxe, one of the United States District Court Judges for the Southern District of New York, in the Second Circuit, to Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker,

Claimants' Citation.

William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation, GREETING: 373

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named 374 on the 3rd day of April, 1936, pursuant to a petition for appeal and an order filed in the Clerk's office of the District Court of the United States for the Southern District of New York, allowing such petition for appeal in "In the Matter of United Cigar Stores Company of America, Debtor (In proceedings for reorganization of a corporation, No. 59,886)," wherein Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, are the appellants and you are appellees, to show cause, if any there be, why the order of this Court in said petition mentioned should not be 375 corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 4th day of March, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States the one hundred and sixtieth.

ALFRED C. COXE,
United States Judge for the Southern District of New York in the Second Circuit.

Claimants' Bond.

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MASSACHUSETTS BONDING AND INSURANCE COMPANY

Home Office, Boston, Massachusetts.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE SECOND CIRCUIT.

BOND FOR DAMAGES AND COSTS.

377 In Proceedings for Reorganization of a corporation.

No. 59,886.

The petitioners, Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, claimants herein.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

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KNOW ALL MEN BY THESE PRESENTS, That MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation organized under the laws of the Commonwealth of Massachusetts, authorized to transact business in the State of New York, having an office and place of business at 130 William Street, Borough of Manhattan, City of New York, is held and firmly bound unto Irving Trust Company, as trustee of the estate of United Cigar

Stores Company of America, Debtor, United Cigar 379
Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation, in the sum of TWO HUNDRED FIFTY AND 00/100 ($250.00) DOLLARS, to be paid to the said Irving Trust Company, as trustee of the estate of United Cigar Stores Company of 380
America, Debtor, United Cigar Stores Company of America, Jacob Ruppert Realty Corporation, Grayson M-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation, for the payment of which, well and truly to be made, the said MASSACHUSETTS BONDING AND INSURANCE 381
COMPANY binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 4th day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-six.

WHEREAS, the petitioners, Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, claimants herein, have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit,

382 to reverse the order dated the 4th day of February, 1936, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York,

NOW, THEREFORE, the condition of this obligation is such, that if the above named Caroline R. Kuehner and Frederick G. Fischer, as trustees under the will of Adam Fischer, claimants herein, shall prosecute and appeal to effect, and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full
383 force and virtue.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By FREDERICK O. BEATTIE,
Attorney-in-Fact.

Attest:

GARRETT B. CARMAN,
Attorney-in-fact.

(Verification, etc.)

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Admission of Service of Copy of Claimants' Citation and Bond.

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DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA;

Debtor.

386 Service of a copy of the citation on appeal and of a copy of the Bond in the above entitled proceeding with notice of filing thereof is hereby admitted this 4th day of March, 1936.

ROSENBERG, GOLDMARK & COLIN,
Attorneys for Debtor.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company, Trustee for the Estate of United Cigar Stores Company of America.

387 SHEARMAN & STERLING,
BERLE & BERLE,
Attorneys for Stockholders' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Debentureholders' Protective Committee.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corp.

MILBANK, TWEED, HOPE & WEBB,
Attorneys for Phoenix Securities Corp.

Petition for Appeal of Preferred Stockholders' Protective Committee and of Debenture-holders' Protective Committee and Order Allowing Appeal.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation—No. 59886.

Claim No. 5184.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

389 Debtor.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Grayson M-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee of United Cigar Stores Company of America, intervenors in the above entitled proceeding pursuant to an order of this Court dated and entered herein

390 September 28, 1934, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Protective Committee for the holders of Cigar Stores Realty Holdings, Inc. Twenty-year 5½% Sinking Fund Gold Debentures, Series A, intervenors in the above entitled proceeding pursuant to an order of this Court dated and entered herein October 22, 1934, believing themselves aggrieved for the reasons specified in the Assignment of Errors filed herewith, by the order of this Court made and entered herein on February 4th, 1936, in so far as said order approved and confirmed such part of the report of Honorable Irwin Kurtz, Special

Petition for Appeal of Preferred Stockholders' Protective Committee and of Debenturcholders' Protective Committee and Order Allowing Appeal.

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Master, dated October 23, 1935, as recommended that the claim of Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, be allowed as a general claim in the amount of $44,377.55, do hereby appeal from said order of February 4, 1936 to the United States Circuit Court of Appeals for the Second Circuit, and pray that their appeal may be allowed and that a citation may be granted, directed to Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, Irving Trust 392
Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, Jacob Ruppert Realty Corporation, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee and Phoenix Securities Corporation, commanding them to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record upon which said order of February 4, 1936 was based, and of all proceedings relating to said claim, duly authenticated, be transmitted to the United States 393
Circuit Court of Appeals for the Second Circuit.

Dated, New York, N. Y., March 4, 1936.

GRAYSON M-P. MURPHY, G. W. BAKER, WILLIAM DE KRAFFT and BENJAMIN GRAHAM, as a Preferred Stockholders' Protective Committee of United Cigar Stores Company of America,

By: SHEARMAN & STERLING,
BERLE & BERLE,
Their Attorneys and Solicitors.

and

Petition for Appeal of Preferred Stockholders' Protective Committee and of Debentureholders' Protective Committee and Order Allowing Appeal.

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LEWIS L. STRAUSS, BURNETT WALKER and MAURICE WERTHEIM, as a Debentureholders' Protective Committee,
By: DAVIS, POLK, WARDWELL, GARDINER & REED,
Their Attorneys and Solicitors.

SHEARMAN & STERLING,
55 Wall Street,
Borough of Manhattan,
395 New York, N. Y.

and

BERLE & BERLE,
70 Pine Street,
Borough of Manhattan,
New York, N. Y.
Attorneys and Solicitors for Preferred Stockholders' Protective Committee, as aforesaid.

DAVIS, POLK, WARDWELL, GARDINER & REED,
15 Broad Street,
396 Borough of Manhattan,
New York, N. Y.
Attorneys and Solicitors for Debentureholders' Protective Committee, as aforesaid.

The foregoing appeal is hereby allowed this 4th day of March 1936, upon giving bond conditioned as required by law in the sum of $250.00.

ALFRED C. COXE,
United States District Judge for the
Southern District of New York.

Assignment of Errors of Preferred Stockholders' Protective Committee and of Debentureholders' Protective Committee.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for Reorganization of a Corporation.

No. 59886.

Claim No. 5184.

In the Matter

of

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UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

Now comes Grayson M-P. Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee of United Cigar Stores Company of America, intervenors in the above entitled proceeding, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Protective Committee for the holders of Cigar Stores Realty Holdings, Inc., Twenty-year 5½% Sinking Fund Gold Debentures, Series A, intervenors in the above entitled proceeding, and file the following assignment of errors upon which they will rely upon prosecution of the appeal herein from the order of the United States District Court for the Southern District of New York made and entered February 4, 1936, and say that said order of February 4, 1936 is erroneous in so far as it approves and confirms such part of the report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935, as recommends that the claim of Frederick G. Fischer and Caro-

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line R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, be allowed as a general claim in the amount of $44,377.55, and in so far as said order of February 4, 1936 approves and confirms the rulings of said Special Master at the hearing on said claim, and, without limiting the generality of the foregoing, the said order of February 4, 1936 is erroneous for the following reasons:

401 1. The Court erred in approving and confirming so much of said report as refers

(a) To the purposes of the enactment of Section 77B of the Bankruptcy Act,

(b) To the alleged circumstance that a reorganization under Section 77B should include every possible claim existing against the Debtor, whether such claim be absolute, conditional, contingent or otherwise,

(c) To the alleged circumstance that there can be no distinction under Section 77B between provable and non-provable claims, as

402 existed in the ordinary bankruptcy liquidation proceeding.

as having any bearing on the legal questions presented by the claim herein or the objections made thereto.

2. The Court erred in approving and confirming so much of said report as decides that a landlord whose lease has been rejected by a Trustee and the premises returned has a claim under Section 77B for damages where the lease contains a covenant of indemnity.

3. The Court erred in approving and confirm-

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ing so much of said report as decides that the fact that such a landlord as the present claimants could not maintain an action at common law upon the indemnity covenant contained in the lease until the expiration of the term makes no difference to the aims and purposes of Section 77B and the results that were sought to be obtained therefrom, and that such a landlord has a claim under Section 77B which would necessarily have to be included in and disposed of in a reorganization proceeding.

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4. The Court erred in approving and confirming so much of said report as determines that a consideration of the purposes of Section 77B and any of the language of Section 77B requires that the landlords' claim herein be allowed to the extent of the damages that could be legally provable.

5. The Court erred in approving and confirming so much of said report as determines that the intent of Congress in the enactment of Section 77B was to grant a landlord a right to an immediate allowance in a reorganization proceeding, where there had been a rejection of his unexpired lease, irrespective as to whether his rights were based upon a covenant of damages or a covenant of indemnity with a clause for immediate assessment of damages or at the expiration of the term, and irrespective as to whether an action could be maintained immediately at common law upon any such covenant of indemnity.

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6. The Court erred in approving and confirming so much of said report as refers

(a) To the alleged intent of Congress to

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free a Debtor of all future liability on executory contracts of indemnity by proceedings in reorganization where there has been a rejection of the lease either by a Trustee or pursuant to an order of the Court,

(b) To the alleged purpose of Congress to effect a present, immediate disposition and adjustment of all claims, actual or contingent, and to fix the present value of the contract or the amount of the damage suffered as a

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result of such rejection of the unexpired lease by the Trustee in Bankruptcy or by order of the Court, so as to efficiently and expeditiously aid and carry through the purposes of reorganization,

as having any bearing on the legal questions presented by the claim herein or the objections made thereto.

7. The Court erred in approving and confirming so much of said report as determines that a claim based upon the covenant of indemnity contained in the lease upon which the claim herein

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is based can be evaluated in a Section 77B proceeding and is reasonably susceptible of immediate valuation, and that loss of rents over a period of time in the future can be presently ascertained by the difference between the rent reserved and the rental value for the balance of the term, or in any other manner.

8. The Court erred in approving and confirming so much of said report as determines that the landlords' claim herein should be allowed to the extent of three years' rent on an equal parity with other provable claims, and that such an al-

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lowance will carry out the purposes sought to be accomplished by Section 77B, and is just and proper, and is in accordance with the express provisions of Section 77B, subdivision (b).

9. The Court erred in approving and confirming so much of said report as determines that the report of the Hon. Thomas D. Thacher, acting as Special Master in the matter of Radio-Keith-Orpheum Corporation, Debtor, does not affect or is not applicable to the legal questions presented by the claim herein and the objections made thereto.

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10. The Court erred in approving and confirming so much of said report as attempts to distinguish the report of the Hon. Thomas D. Thacher, acting as Special Master in the matter of Radio-Keith-Orpheum Corporation, Debtor.

11. The Court erred in approving and confirming so much of said report as refers to the time limit within which proofs of claim must be filed in a reorganization proceeding as having any bearing on the legal questions presented by the claim herein and the objections made thereto.

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12. The Court erred in approving and confirming so much of said report as recommends that damages measured by the difference between the rent reserved and the reasonable rental value should be assessed upon the hearing held upon the objection to the claim, disposed of then, and the amount of the Debtor's obligations immediately determined, and that such a rule would accomplish the purposes and come within the scope contemplated by Section 77B and would be workable, feasible, and of general application.

13. The Court erred in approving and confirm-

412 ing so much of said report as recommends that the landlords' claim herein should be allowed in the sum of $44,377.55 as a general claim.

14. The Court erred in approving and confirming the ruling of the Special Master at the hearing on the claim in admitting evidence as to the rental value of the demised premises on or about August 29, 1932. The evidence, introduced in a supplementary stipulation of facts to which counsel reserved the right to make certain objections
413 as to its admissibility in evidence, was substantially as follows:

> That Charles N. Schragger, a real estate appraiser doing business in the City of Trenton, State of New Jersey, is a duly qualified expert on rental values of real estate in the City of Trenton, New Jersey, and particularly real estate situated in the portion of said city in which the premises covered by the lease hereinafter mentioned are situated, and that if called as an expert witness at the hearing to be held before Hon. Irwin Kurtz,
> 414 as Special Master in the above-entitled proceeding, on the objections to the claim of Caroline R. Kuehner and Frederick G. Fischer, as Trustees under the Last Will and Testament of Adam Fischer, deceased, against the above named Debtor, he would testify as follows:
>
> The fair rental value as of August 29, 1932 of the premises covered by the lease dated October 18, 1926, made by Caroline R. Kuehner and Edward A. Fischer, as Executors of and Trustees under the Last Will and Testament of Adam Fischer, deceased, and others,

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as landlords, to the Debtor, as tenant, for a term commencing on August 29, 1932, and ending on March 31, 1946, under a lease containing the same provisions as those contained in said lease dated October 18, 1926, except as to the term of the leasehold, is $4,750 a year net. The fair rental value of said premises as of August 29, 1932, for a term commencing November 14, 1932, and ending on March 31, 1946, under a lease containing the same provisions as those contained in said lease dated October 18, 1926, except as to the term of the leasehold, is the same, to wit, $4,750 a year net.

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The fair rental value as of November 14, 1932, of said premises for a term commencing on November 14, 1932, and ending on March 31, 1946, under a lease containing the same provisions as those contained in said lease dated October 18, 1926, except as to the term of the leasehold, is also $4,750 a year net.

That in his judgment there is no substantial difference in the rental values of said premises whether taken as of August 29, 1932, or November 14, 1932, as during this period there was no appreciable change in rental values.

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The aforesaid opinion as to the rental value of said premises is based not only upon the change in rental values since the lease between the landlords and the Debtor dated October 18, 1926, was made and August 29, 1932 and November 14, 1932, respectively, but also upon the factor that said premises must now be rented as an inside property separate and apart from the adjoining prem-

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ises situated on the corner of State and Broad Streets, Trenton, New Jersey, whereas both said premises and said corner premises were rented as a unit to the Debtor by the respective owners thereof on or about October 18, 1926. Said corner premises were relet as a separate unit, under a lease negotiated by said Charles N. Schragger for a term of ten years; that, accordingly, in his opinion there will be no possibility whatever

419 of reletting during said ten-year period the premises covered by the lease dated October 18, 1926, in conjunction with said corner premises.

That the present return from the premises in question is only a net amount of $3,000 a year, but that over the period of approximately fourteen (14) years said premises should return a net annual rental, as previously stated, of $4,750.

15. The court erred in holding that the claimants herein are entitled to immediate damages

420 as arbitrarily fixed by the provisions of Section 77B of the Bankruptcy Act.

16. The Court erred in failing to disaffirm the whole of said report of Hon. Irwin Kurtz, Special Master, dated October 23, 1935.

17. The Court erred in failing to determine that the claim herein should be disallowed in whole as a general claim and barred from any participation in any plan of reorganization herein on a parity with other claims allowed or allowable as general claims herein.

WHEREFORE, Grayson M.-P Murphy, G. W.

Assignment of Errors of Preferred Stockholders' Protective Committee and of Debentureholders' Protective Committee.

Baker, William de Krafft and Benjamin Graham, as a Preferred Stockholders' Protective Committee, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Debentureholders' Protective Committee, pray that said order of February 4, 1936 be reversed in part and that the aforesaid claim be determined to be disallowed in whole as a general claim and barred from any participation in any plan of reorganization herein on a parity with other claims allowed or allowable as general claims herein.

Dated, March 4, 1936.

SHEARMAN & STERLING

and

BERLE & BERLE,
Attorneys and Solicitors for
Preferred Stockholders' Protective Committee,
Office and Post Office Addresses respectively,
55 Wall Street,
70 Pine Street,
Borough of Manhattan,
New York City, N. Y.

and

DAVIS, POLK, WARDWELL,
GARDINER & REED,
Attorneys and Solicitors for
Debentureholders' Protective Committee,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

Citation on Cross-Appeal.

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By the Honorable Alfred C. Coxe, one of the United States District Court Judges for the Southern District of New York, in the Second Circuit, to Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, Jacob Ruppert Realty Corporation, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation,

425 GREETING:

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named on April 3rd, 1936, pursuant to an appeal duly obtained and filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Grayson M-P. Murphy, G. W. Baker, William de Krafft and
426 Benjamin Graham, as a Preferred Stockholders' Protective Committee of United Cigar Stores Company of America, intervenors, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Protective Committee for the holders of Cigar Stores Realty Holdings, Inc., Twenty Year 5½% Sinking Fund Gold Debentures, Series A, intervenors, are the appellants and you are appellees, to show cause, if any there be, why the order of this Court in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 4th day of March, in the year of our Lord, One thousand nine hundred and thirty-six, and of the Independence of the United States the One hundred and sixtieth. 427

(Sgd.) ALFRED C. COXE,
United States Judge for the Southern District of New York in the Second Circuit.

(C. W.)

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Bond for Costs on Cross-Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

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KNOW ALL MEN BY THESE PRESENTS, that the GREAT AMERICAN INDEMNITY COMPANY, a corporation organized and existing under the laws of the State of New York, with an office and place of business at No. 1 Liberty Street, New York City, New York, as Surety, is held and firmly bound unto Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, Irving Trust Company, as

Trustee of the Estate of United Cigar Stores Company of America, Debtor, Jacob Ruppert Realty Corporation, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation, in the sum of Two hundred fifty and 00/100 ($250.00), to be paid to the said Frederick G. Fischer and Caroline R. Kuehner, as Executors and Trustees under the Will of Adam Fischer, Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor, Jacob Ruppert Realty Corporation, Peter Grimm, Stewart C. Pratt and W. Howard Wright, as a Landlords' Protective Committee, and Phoenix Securities Corporation, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of March, 1936.

WHEREAS, Grayson M-P Murphy, G. W. Baker, William de Krafft and Benjamin Graham, as a preferred Stockholders' Protective Committee of United Cigar Stores Company of America, intervenors, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Protective Committee for the holders of Cigar Stores Realty Holdings, Inc. Twenty-year 5½% Sinking Fund Gold Debentures, Series A. intervenors believing themselves aggrieved are about to prosecute an appeal to the United States Circuit Court of Appeals for the Second Circuit from an order of this Court made and entered herein on February 4th, 1936.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above named Grayson M-P Murphy, G. W. Baker, William de Krafft and

Benjamin Graham, as a Preferred Stockholders' Protective Committee of United Cigar Stores Company of America, intervenors, and Lewis L. Strauss, Burnett Walker and Maurice Wertheim, as a Protective Committee for the holders of Cigar Stores Realty Holdings, Inc. Twenty-year 5½% Sinking Fund Gold Debentures, Series A. intervenors shall prosecute said appeal to effect and answer all damages and costs, if they fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue. 433

GREAT AMERICAN INDEMNITY COMPANY 434

By JAMES E. SWEENEY, Attorney-in-Fact.

Bond No. B-58,821
(Seal)

[Acknowledgment and Justification.]

435

Opinion of Judge Knox.

436

The within report of the Special Master is confirmed with the exception that the claim as allowed shall represent the extent of claimant's right to participate in these proceedings. In my opinion, the provisions made by Section 77 b for the allowance of claims of landlords upon breached real estate leases were intended to put at rest the interminable speculative considerations that had to be taken into account in arriving at damages growing out of broken leases. In a proposed reorganization it is essential that claims be known and fixed at an early date—it is better that dam-
437 ages be fixed arbitrarily, as was done, than they should depend upon the attempts of parties in interest, assisted by experts, to read the future.

1/18/36

JNO. C. KNOX,
U. S. D. J.

UNITED CIGAR STORES CO.

438

Stipulation as to Record.

439

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

CAROLINE R. KUEHNER and FREDERICK G. FISCHER, as trustees,
Appellants,

440

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Appellees.

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Cross-Appellants,

CAROLINE R. KUEHNER and FREDERICK G. FISCHER, as trustees, et al.,
Cross-Appellees.

441

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled matter as agreed on by the parties, and that the Clerk of said Court may certify the same as correct.

Dated, New York, March 19th, 1936.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Claimants, Caroline R. Kuehner and Frederick G. Fischer, as trustees.

442 CRAVATH, DEGERSDORFF, SWAINE & WOOD,
Attorneys for Irving Trust Company, as trustee.

SHEARMAN and STERLING,

and

BERLE & BERLE,
Attorneys for Stockholders' Protective Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
443 Attorneys for Debentureholders' Protective Committee.

M. CARL LEVINE,
Attorney for Jacob Ruppert Realty Corporation.

MILBANK, TWEED, HOPE & WEBB,
Attorneys for Phoenix Securities Corporation.

MITCHELL, TAYLOR, CAPRON & MARSH,
Attorneys for Landlords' Protective
444 Committee.

Clerk's Certificate.

UNITED STATES DISTRICT COURT, 445

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

CAROLINE R. KUEHNER and FREDERICK G. FISCHER,
as trustees,
Appellants,

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Appellees. 446

GRAYSON M-P. MURPHY, et al., as a Preferred Stockholders' Protective Committee, et al.,
Cross-Appellants,

CAROLINE R. KUEHNER and FREDERICK G. FISCHER,
as trustees, et al.,
Cross-Appellees.

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby CERTIFY that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter 447 as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 20th day of March, in the year of our Lord one thousand nine hundred and thirty-six, and of the independence of the said United States the one hundred and sixtieth.

CHARLES WEISER,
Clerk.

(Seal)

[fol. 150] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CAROLINE R. KUHNER and FREDERICK G. FISCHER,
Appellants,

against

IRVING TRUST COMPANY, Trustee, Appellee, and Others

Before Manton, L. Hand and Augustus N. Hand, Circuit Judges

Appeals from an order of the District Court for the Southern District of New York allowing a claim of lessors for future rent in a reorganization proceeding under §77B of the Bankruptcy Act.

Rollin Browne, for the claimants.
William D. Whitney, for Irving Trust Company, Trustee.
Edgar C. Crossman, for the Debenture Holders Committee.
Sanford H. E. Freund, for the Preferred Stockholders' Committee.
M. Carl Levine, for Jacob Ruppert Realty Corp'n., Amicus Curiæ.

L. HAND, Circuit Judge:

These appeals arise from a claim by lessors against a lessee, the debtor, in a reorganization proceeding under §77B of the Bankruptcy Act. The debtor had entered the locus in quo under a lease from the claimants by which it agreed that, if it should be adjudicated a bankrupt, they might reenter and that it would then "indemnify the Land-[fol. 151] lords against all loss of rent which the Landlords may incur by reason of such termination during the residue of the term". The debtor was adjudicated in 1932, before §77B was passed, and its trustee rejected the lease, after which the lessors reentered. They have filed a claim for the difference between the rent reserved and the present value of the term; the judge allowed the claim, but limited it to three years rent, in accordance with subdivision (b) (10) of §77B. A committee of debenture holders and a committee of preferred shareholders appeal, asserting that it should be

expunged in toto; the lessors appeal because it has been limited as against shareholders; they concede that it should be subordinate to the claims of other creditors so far as it exceeds the limit.

The first question is as to the appeals of the two committees which go to the allowability of any part of the claim. The argument is that only the breach of the covenant to indemnify the lessors is provable, and that as to this, since the period of the term must expire before they can know what their loss is, or, indeed whether they have suffered any, the damages must await the expiration of the period of the term; and that it cannot be liquidated now. Subdivision (b) (10) certainly makes the "rejection" of the lease a factor in recovery, though it does not say on what else the recovery shall be based, except that it shall be for the lessor's "injury". When first introduced into the House, (H. R. 5884), the section did not expressly mention leases; the language merely was that any rejection of an executory contract should be a breach, and should result in a claim for damages [fol. 152] unless the contract was ended by "reentry", among other things.* However, that word showed that leases were included; and if the act had followed the original House bill the committees would certainly be right in saying that the claim at bar could stand only on the covenant, if it could on that. It is very difficult to know what the section really means, as it finally did emerge. For instance, "rejection" by the lessee under the judge's direction is classed with "rejection" by a receiver or trustee, as though its legal effect were the same. Obviously it is not; rejection by a receiver or trustee merely ends the possibility that he may become an assignee of the term by operation of law; it does not create the lessee's default, though of course acceptance would relieve him in futuro. But, whatever was meant, we cannot suppose that Congress was trying to make over the contract by imposing a liability for

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*"In case any executory contract shall be rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed provided such contract shall not have been terminated by forfeiture, reentry or otherwise."

future rent on the lessee after the term had ended. Indeed, we should have considerable doubt whether the bankruptcy power would support such an effort. At least the original bill attempted nothing of the sort, and a change of language so inartificial and obscure ought not, it seems to us, be given so extravagant an effect. It is not necessary to read it so; it is enough if the language be taken to mean that the "rejection" of a lease shall be a present breach of all the [fol. 153] lessee's promises, either to pay rent, to rebuild, to cover taxes or whatever else they may be. Indeed, if it continues his liability after reentry, it was redundant to include covenants "for damages or indemnity". We do not therefore believe that this language creates new claims after reentsy, and the committees, so far, are right. We have in substance already so declared, and we adhere to what we said. In Re United Cigar Stores Co., Ex parte Otis Land Estate Co., 83 Fed. (2) 202, 206.

But in the result the committees are wrong. At petition filed the lessee was under an absolute liability to indemnify the lessors, though in an unknown amount; and indeed it was not even certain that there would be any recovery at all. That the payment was to be made in the future was not indeed material, but the ad damnum was so uncertain that before the reorganization act the claim could not have been proved. Manhattan Properties v. Irving Trust Co.; 291 U. S. 320. The question is how far that act has changed the law. Again the language is obscure, but now the purpose is apparent; it was at least to give lessors some immediate relief which had been impossible in bankruptcy. This is obvious in §63 (a) (7), and the language there is like that of §77B (b) (10). A present and definite claim "for damages and indemnity" was to be provable, and its amount could be computed only in case a present appraisal of the future value of the term was accepted as one factor in the equation. Otherwise the statute accomplished nothing. We hold therefore that the claim is to be liquidated like a claim for breach of an executory contract for chattels; that is, by discounting the future payments and subtracting the appraised value of the term from their sum.

[fol. 154] There remains the question of limitation; first whether the statute meant to limit such claims except as against other creditors; second, whether it was constitutional, if it did. As we have already shown, the House bill

ranked such claims generally on a parity with other debts. The Senate at first let this stand as to lessors in reorganizations, but limited it in bankruptcy to one year. Later it changed its position as to reorganizations by subordinating the claim to other debts so far as it exceeded one year's rent. In conference the present form was adopted; the words, "ranking on a parity" etc., then becoming unnecessary, strictly speaking. The construction suggested by the lessors might indeed have been a compromise between the position of the two houses, but if it was, it is impossible to imagine why it should have been put in the words chosen. The Senate had just shown that it knew how to say that the lessor should have an unlimited subordinate claim; the substitute expressly declared that the claim should in general be on a parity, but that it should be limited. How this can be wrenched into saying that in addition it should be allowed against shareholders without limit we cannot understand; it is more reasonable to assume that the clause was merely vestigial. We have no doubt that such claims are provable only so far as they share in "parity".

The supposed unconstitutionality of the act, so read, depends upon the fact that lessors' claims, though calculated in customary ways, are not only denied equal standing with other debts, which would indeed be permissible, but are not [fol. 155] allowed against shareholders. This was bad enough, the argument runs, when the debt was not discharged, but now even that remedy is taken away, and in its stead an inadequate and truncated substitute is provided. This position presupposes that the appraisal of the future value of real estate is so reliable a basis for the distribution of a fund in court, that Congress was obliged to treat it as good against shareholders. No doubt the present tendency is to accept more speculative evidence of damages than formerly, rather than turn away a promisee empty-handed; but there are still limits, and indeed there always must be, if human affairs are not to be subject to the fancies of any dreamer who has the hardihood to take an oath. The appraisal of realty at a distant time is the merest guess; nobody can possibly know anything about it, and one man's guess is nearly as good as another's. For this reason Congress might circumscribe its use to the near future, not only as against creditors, but against the lessee itself. That would be no more drastic or unfair than

the common-law had been again and again. The lessors reply that this might be well enough, if Congress had really acted on that theory, but it did not. Such a principle would require the limit to be reckoned in future losses, not in rents; as for example, by saying that the difference between the rents and the appraised future value should be allowed for only five years. Three years' gross rents has no relation whatever to three or five years' losses. For example, the term might have a value equal to three-quarters of the rents; if it did, the lessor could prove twelve years' losses; [fol. 156] and a present forecast over that whole period would be treated as reliable evidence. If on the other hand the value of the term was only one-fourth of the rents, the lessor could recover only four years' losses; and any further forecast would be considered too conjectural. The limit actually fixed cannot therefore be defended on the supposed principle; and the statute is mere caprice.

The mere fact that the test is a rude one will not, however, invalidate the act if it has some rational relation to the end to be achieved; courts do not sit to enforce counsels of perfection upon legislatures. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78; Second Employers' Liability Cases, 223 U. S. 1, 52-53; Chicago Dock Co. v. Fraley, 228 U. S. 680, 687. The limit chosen has such a rational relation. It is indeed true theoretically that there may be cases where a lessor's losses would be recoverable for only three years, the value of the term having fallen to nothing; but those would be extreme cases and rare; ordinarily the term will have a substantial residual value and the lessor's losses will be recoverable for four or five years at least. That is a period which Congress might well fix as the maximum forecast which it would be safe to act on. There will, however, be many cases where recoverable losses will go far beyond that period, and that makes the discrimination. Primarily it is the lessee who should complain of that; he may well argue that if appraisals of the future become too conjectural at four or five years they ought not to be allowed for ten, fifteen or twenty. There are two answers to this; first, it is an objection good only in the lessee's mouth, and second, it is not good in his. It is abundantly settled [fol. 157] that to challenge a statute one must suffer a personal grievance; vicarious complaints will not serve. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 545;

Jeffery Mfg. Co. v. Blagg, 235 U. S. 571, 576; Arizona Employers Liability Cases, 250 U. S. 400, 429; Oliver Iron Co. v. Lord, 262 U. S. 172, 180-181; Gorieb v. Fox, 274 U. S. 603, 606. Moreover, a lessee could not complain*t*; he is getting a discharge upon a payment which he cannot show is too great until the occasion is past. Therefore, the lessor's only grievance comes to this, that when his losses are large he is not treated equally with those whose losses are small. If, as we think, no lessor is unjustly treated as against his lessee, this is a complaint to which we are not disposed to lend an auspicious ear. No doubt inequality without basis is favoritism, and favoritism arouses resentment among just persons, even when the unpreferred would have no complaint, if they stood alone. But all inequalities are not of equal moment and here there is an attempt at equality by giving all members of the class a share in the pot, measured by a uniform rule. The Fifth and Fourteenth Amendments are not manuals or vade mecums; they stand rather for attitudes of the will then for commands to conduct. Certainly in cases like this where the law is not an effort to compose conflicting group interests,—though possibly in those cases too,—perhaps the best way to apply their precepts is to ask whether they shock one's native and unsophisticated sense of fair play. Nor is that irrational either, for a legislature is justified in embodying that sense into law; it is not obliged to, and usually it cannot, adjust all interests with ideal nicety; nor is it bound to the best [fol. 158] contrivances, as we have just said. Nobody should be shocked that in a class of claims like these, so inherently uncertain, a piepowder standard is chosen, even though it operates unevenly, as unquestionably it does.

There remains only the fact that the debtor is discharged. A petition under § 77B, whether voluntary or involuntary, must allege that the debtor is insolvent, or that it cannot pay its debts as they mature. Shareholders are entitled to protection as of right only "for the realization by them of the value of their equity, if any", (subd. (b) (4), § 77B). If they get an interest in the reorganized insolvent, it must be because it is desirable to continue the business under the old management, or because they will be induced to subscribe new money, or for some other reason of the sort. If, therefore, a corporation is insolvent and there is no equity, the right to pursue the lessee is a

phantom which Congress did right to ignore. It is true that corporations which cannot pay their maturing debts may have a real equity, and a discharge against them may be a substantial detriment to the creditor. But before holding that the substitute was here inadequate we must look at the position in which these lessors would have found themselves if there had been no reörganization. The corporation being in default would by hypothesis be open to dismemberment by its creditors; in that scramble the lessors would not share, for they would have no present claim. Only as their rents fell due, could they collect; unless indeed the covenant must be read as that in Hermitage Co. v. Levine, 248 N. Y. 333, in which event they would have had to wait till the end of the whole period. Such remedies [fol. 159] against a debtor are no better than if it were out and out insolvent. This reasoning does not apply when there is a fixed sum unconditionally due before petition, and possibly the limit does not then apply either. We assume that it does apply, when the lease has a covenant allowing the lessor to charge the lessee after reëntry in a single sum with the difference between the accelerated rents and the present value of the term, and he reënters after petition filed. In that situation our reasoning just above does not perhaps carry as persuasively, and we may leave the question open whether the limit is then valid. As to this lease it certainly is, and that is true whether we construe the covenant as requiring successive indemnities, or a single one at the end of the whole period.

Order affirmed.

[fol. 160] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Co. Kuehner v. Irving Trust. Opinion. L. Hand, C. J.

[fol. 161] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 20th day of July, one thousand nine hundred and thirty-six.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of UNITED CIGAR STORES COMPANY OF AMERICA, Debtor,

CAROLINE R. KUEHNER and Another; CARYSOM M-P MURPHY et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 162] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re United Cigar Stores Company of America. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 20, 1936. William Parkin, Clerk.

[fol. 163] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 162, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of United Cigar Stores Company of America, Debtor, Caroline R. Kuehner and another; Carysom M-P Murphy et al., Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of July, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 164] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8426-C)